

1                   IN THE UNITED STATES DISTRICT  
2                   FOR THE WESTERN DISTRICT OF TENNESSEE  
3                   WESTERN DIVISION

---

4                   ACLU OF TENNESSEE, INC.,

5                                   Plaintiff,

6                   vs.

                                  No. 2:17-cv-02120-JPM

7                   THE CITY OF MEMPHIS,

8                                   Defendant.

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10                                   MODIFICATION HEARING  
11                   BEFORE THE HONORABLE JON PHIPPS MCCALLA  
12                                   (Via Zoom Videoconference)

14                                   Thursday  
15                                   18th of June, 2020

23                                   CANDACE S. COVEY, RDR, CRR  
24                                   OFFICIAL REPORTER  
25                                   FOURTH FLOOR FEDERAL BUILDING  
                                  MEMPHIS, TENNESSEE 38103

UNREDACTED TRANSCRIPT

A P P E A R A N C E S

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Appearing on behalf of the Plaintiffs:

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Appearing on behalf of the Defendant:

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1 Thursday

2 June 18, 2020

3 The Zoom Modification hearing in this case began on  
4 this date, Thursday, 18th day of June, 2020, at 9:00 a.m.,  
5 when and where evidence was introduced and proceedings were  
6 had as follows:

7  
8 -----

9  
10 THE COURT: All right. We were in the  
11 examination of the Monitor. And I want to make sure we have  
12 everyone there. I think I do.

13 Mr. McMullen, I can see you. Are we ready to  
14 proceed?

15 MR. MCMULLEN: We're ready to proceed, Your  
16 Honor. As a preliminary matter, Defendant's Exhibit 12,  
17 13 and the other items that we dealt with that we did not  
18 produce, the three e-mails, we would like to move them into  
19 evidence. 12 and 13. And then the RFA that contained the  
20 three e-mails, we would like to move them into evidence late  
21 after an acceptable redaction by the Court.

22 THE COURT: That's fine. And let's make sure.  
23 As to 12, I'm going to look at that briefly. But of course,  
24 that's the focus group project, as I understand it. So let  
25 me see 12 just to be sure. It's -- I marked 12. So

1 Mr. Sample, I'm just going to check them because we did  
2 mark -- we want to make sure we have them sequentially  
3 correct, and that's what we're checking right now. So if  
4 you'll hand me 12, Mr. Sample.

5 MR. MCMULLEN: And it's Defendant's 12, Your  
6 Honor.

7 THE COURT: Well, there are only court numbers,  
8 so once it's introduced, it will bear that number. But let's  
9 make sure we've got the right thing because we had marked  
10 as 12 the focus group project. And so that's already got a  
11 number. And so you'll have to be number -- you'll have a  
12 sequential number. It will be 13 is what I'm saying.

13 So we have what was originally submitted by the  
14 City as 12, just to help us with the numbering. It is now  
15 becoming 13, and it starts with memorandum August 21, 2019 to  
16 the City of Memphis from the independent Monitor,  
17 Mr. Stanton. I want to make sure we're together on that; is  
18 that -- that is correct, right?

19 MR. MCMULLEN: That is correct.

20 THE COURT: Okay. I'm going to hand that to  
21 Mr. Sample to make sure. Mr. Sample, do we have that marked  
22 now?

23 THE CASE MANAGER: We will.

24 THE COURT: That way we'll have it. And then  
25 let's go to what will be the new 13. And we'll make sure

1 we've got that. And it looks like that may be the -- some of  
2 the June 17, 2020 e-mails, I think it is. And that had a  
3 redaction, which was going to occur. And that's the one you  
4 were pointing out you were redacting, right, Mr. McMullen?

5 MR. MCMULLEN: Yes, Your Honor.

6 (WHEREUPON, the above-mentioned document was  
7 marked as Exhibit Number 13.)

8 THE COURT: So we will mark the unredacted  
9 version as temporary 14. That will be temporary 14. And the  
10 redacted version, we will never actually record the  
11 unredacted one. That will be 14.

12 (WHEREUPON, the above-mentioned document was  
13 marked as Exhibit Number 14.)

14 THE COURT: So wait just one second. I have to  
15 make a couple of notes here. Okay. We've got new 13 and we  
16 have new 14, which of course, I'm going to show is redacted.  
17 And I understand we'll get that. So 14. And I'm just going  
18 to indicate it begins with -- hopefully we've got the correct  
19 beginning point, June 17, 2020 for 21. Ms. Tullis to the  
20 Monitor, Mr. Stanton, and it's got other materials.

21 If it's not correct, we'll want some input to get  
22 it correct. Okay. So I've got 13 and 14, the new 13 and 14.  
23 And I'm sorry, Mr. McMullen. You may have had a 15 there.  
24 Let me check on that. Is there another one that we need?

25 MR. MCMULLEN: Yes, Your Honor.

1 THE COURT: Okay. What is our exhibit that's  
2 following our new 14, which, of course, was the e-mail?

3 MR. MCMULLEN: Defendant's 13.

4 THE COURT: So it will become our 15. And I just  
5 need that one, and we'll make sure we've got it. And that  
6 will be marked -- this is from Wiseman to Mr. Glover,  
7 attachments, and it says, "Mr. Stanton asked that I forward  
8 you the attached correspondence." And there was some  
9 attached correspondence from Mr. Glover to Mr. Stanton; is  
10 that the correct one?

11 MR. MCMULLEN: Yes, Your Honor.

12 THE COURT: Of course, it's got attached to it an  
13 August 29, 2019 letter from Mr. Stanton to Mr. Glover. So  
14 we're going to put a sticker on that one. I'm going to  
15 reflect that, as I've indicated, collective exhibit. And it  
16 starts with this initial e-mail, Wiseman to Mr. Glover,  
17 August 29, 2019. Okay. That's a collective. And that will  
18 be our 15. And then is there another one?

19 (WHEREUPON, the above-mentioned document was  
20 marked as Exhibit Number 15.)

21 MR. MCMULLEN: Yes, Your Honor. Defendant's  
22 Number 20.

23 THE COURT: Okay. And that will be become --

24 MR. MCMULLEN: And we have the redaction to do on  
25 that because I think it has some personal phone numbers or



1 cell numbers on it.

2 THE COURT: Yes. And so that will become our 16.  
3 And it's partly described. It has Mr. Stanton's -- it's  
4 really a CV, a bio CV for Mr. Stanton; is that correct?

5 MR. MCMULLEN: That's correct, Your Honor.

6 THE COURT: Okay. That's 16. And we'll put a  
7 sticker on that one. And is there a 17 at this time, or does  
8 that cover our initial ones?

9 (WHEREUPON, the above-mentioned document was  
10 marked as Exhibit Number 16.)

11 MR. MCMULLEN: That covers everything, Your  
12 Honor.

13 THE COURT: Perfect. Absolutely. And then I'm  
14 handed the exhibit as they come up. So I don't -- I'm trying  
15 not to get too much clutter up here. All right. I think  
16 we're all set then.

17 Mr. McMullen, if you have some additional  
18 questions for the Monitor, please proceed.

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21  
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**TESTIMONY OF EDWARD STANTON, III**

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**\* \* \***

**EDWARD STANTON, III,**

**was called as a witness and having first been duly sworn  
testified as follows:**

**CONTINUED DIRECT EXAMINATION**

**QUESTIONS BY MR. MCMULLEN:**

Q. Mr. Stanton, you were a part of the mediation between  
the ACLU and the City; is that correct?

THE COURT: We all know that mediation matters  
are not admitted, and the rule is clear on that, so if it  
relates to mediation, we just simply need to be careful about  
how we approach that. The statements made by a party during  
mediation are protected. Otherwise, people would never talk  
during mediation, I can assure you of that. So with that  
guidance --

MR. MCMULLEN: I understand, Your Honor. I don't  
intend to get into --

THE COURT: Sure.

MR. MCMULLEN: -- the substance of what was said  
in the mediation.

THE COURT: Thank you very much.

BY MR. MCMULLEN:

Q. Mr. Stanton --

A. Yes. Mr. McMullen, yes, I was a part -- I actually  
served as the mediator for the mediation of the parties in

**TESTIMONY OF EDWARD STANTON, III**

11

1 the last month, yes.

2 Q. Is it true both parties, everybody spent a lot of  
3 hours in the mediation?

4 THE COURT: It's irrelevant. It's irrelevant and  
5 not the type of thing that's ever allowed in any case. It  
6 would not be persuasive or relevant on any point. I don't  
7 question that everybody worked hard, but it has no  
8 evidentiary value in the hearing. I am concerned that we  
9 open -- that there would be an attempt to open a door that  
10 the rules clearly exclude. Wait just one second. I need...

11 MR. MCMULLEN: I understand, Your Honor.

12 THE COURT: Okay. I think everybody is familiar  
13 with the rule on that.

14 MR. MCMULLEN: Rule 8, Your Honor.

15 THE COURT: That's exactly right.

16 MR. MCMULLEN: I understand. I'll withdraw the  
17 question.

18 THE COURT: Sure.

19 MR. MCMULLEN: I have no further questions for  
20 Mr. Stanton.

21 THE COURT: No problem.

22 Let's see if there are any questions by ACLU.

23 MR. CASTELLI: Yes, Your Honor, a couple of  
24 questions. Thomas Castelli for the ACLU.

25 **CROSS EXAMINATION**

**TESTIMONY OF EDWARD STANTON, III**

12

**QUESTIONS BY MR. CASTELLI:**

Q. Good morning, Mr. Stanton.

A. Good morning.

Q. Can you look at the -- I believe it has now been marked as trial Exhibit 14, which it requires some redaction, so I'm not going to put it up. But in particular, it's the letter that Mr. McMullen was questioning you about yesterday afternoon regarding this issue surrounding the Memphis Grizzlies and the conversation that was overheard.

A. Yes.

Q. You've got that in front of you?

A. Yes.

Q. I just wanted to clarify. I got a little confused from the examination yesterday. Looking at the second page of that letter at the very top, my understanding is that your conclusion was that the information, the receipt of the information did not actually violate Section I. Can you read that top paragraph and let me know if that is correct.

A. Yes. The top of page 2?

Q. Yes.

A. Sure. Paragraph begins, "In my view, MPD's receipt of information shared by Mr. Morris would not violate Section I."

MR. CASTELLI: So this is Exhibit 14, Your Honor.

THE COURT: Yes, sir.

**TESTIMONY OF EDWARD STANTON, III**

13

1 BY MR. CASTELLI:

2 Q. Okay.

3 A. I'll start back in. "In my view, MPD's receipt of  
4 information shared by individual would not violate Section I.  
5 This individual did nothing more or less than MPD officers  
6 could have done themselves consistent with Section I, had  
7 they been sitting at the restaurant instead of this  
8 individual."

9 Q. Thank you. And so your issue here and the reason you  
10 denied the request for authority was Section H of the Decree;  
11 is that correct?

12 A. That's in the next paragraph, yes. I explained that.  
13 Section H which prevents information, to the extent  
14 information being shared. That's correct.

15 Q. Okay. And as your --

16 THE COURT: Come on in, guys. Tech people are  
17 working a little late today. It's fine that they've arrived.  
18 Okay. Thank you.

19 MR. CASTELLI: Is the Court ready, Your Honor?

20 THE COURT: I'm fine. I was fine but they need  
21 permission to approach and correct some tech issues.

22 MR. CASTELLI: Yes.

23 THE COURT: We're fine. Go right ahead.

24 BY MR. CASTELLI:

25 Q. And to your knowledge, Mr. Stanton, has there been any

**TESTIMONY OF EDWARD STANTON, III**

14

1 disruptions at any Grizzly games subsequent to that request  
2 for authority?

3 A. No. Not to my knowledge.

4 Q. All right.

5 MR. CASTELLI: Those are my questions, Your  
6 Honor.

7 THE COURT: All right. Well, Mr. Stanton, I  
8 suppose you get a chance to ask yourself a question or two,  
9 if you want to, for further explanation. Kind of odd but you  
10 do. We've had this come up before. You don't actually have  
11 to pose the question, but is there anything else that you  
12 need to add to clarify your testimony? Not necessary but, of  
13 course, there's a mechanism for you to do that.

14 MR. STANTON: I believe, Your Honor, I would just  
15 like to, for point of clarification, the letter that's been  
16 referenced of October the 11th that I just read from and some  
17 of the other items that was referenced by the City on  
18 yesterday, I'd just like -- I think it's worth noting the  
19 point that those were all prior to the November 2019 opinion  
20 of this Court. I gave a greater clarification on Section I,  
21 H and others of the Consent Decree. Just so the Court can  
22 take note of the time.

23 THE COURT: Certainly. And that's absolutely  
24 correct. And it's interesting how this has come up. It's  
25 certainly not necessarily inappropriate to do that. But once

**TESTIMONY OF EDWARD STANTON, III**

15

1 there is a ruling of the Court, then that is the answer on  
2 certain of these questions.

3 And so the fact that that process, which always  
4 takes the time for deliberation occurred is -- and there may  
5 have been some discourse before that, is in most respects  
6 really not relevant in the case. I understand there's an  
7 argument that might have some relevance, but it has minimal  
8 relevance once matters are resolved.

9 But I think that covers that. And I think that  
10 was the point about October 11th and to the degree that  
11 October 11th's letter might in any way disagree or be  
12 different from or need clarification as a result of the  
13 subsequent court order, it's the subsequent court order that  
14 is understandably, hopefully for everyone, relevant in the  
15 matter.

16 Okay. Well, anything else then, Mr. Stanton,  
17 other than that?

18 MR. STANTON: No, Your Honor. I pass the  
19 witness.

20 THE COURT: All right. Absolutely. Well, if  
21 there's any other question for the Monitor, we can address  
22 that at a later point in time. I think we're ready then.

23 We do have a witness that's waiting for the  
24 Monitor. And I see him -- I see his presence on the screen.

25 Mr. Stanton, are you calling this witness, or is

1 someone else handling this witness?

2 MR. STANTON: Your Honor, Mr. Jim Letten, the  
3 deputy monitor will be handling the next witness.

4 THE COURT: Okay. Thank you very much. We'll  
5 let Mr. Letten come forward.

6 MR. LETTEN: Good morning, sir.

7 THE COURT: Good morning. We need to let our  
8 witness then come forward. Who will our next witness be,  
9 Mr. Letten?

10 MR. LETTEN: Yes, Your Honor, may it please the  
11 Court. I think --

12 THE COURT: I see my witness. Now we need to let  
13 the examining individual be on the screen. Yes, it looks  
14 like you're muted, according to my screen. So if you'll  
15 touch the upper left or right.

16 MR. LETTEN: Yes, sir.

17 THE COURT: There you go. If we get an echo, it  
18 usually indicates that there are two instruments that are  
19 working simultaneously. And so we want to make sure that  
20 we're only using one. That's why you get an echo on  
21 occasion. So we're going to try that one more time, and let  
22 counsel announce who he will be calling. I'm going to listen  
23 for that. If we're getting an echo, we'll find the second  
24 instrument and disconnect it.

25 MR. LETTEN: Yes, sir. Your Honor, I'm having --



1 if I could have a minute. I'm having difficulty because I'm  
2 using my telephone camera, my video and also my screen. So I  
3 left the meeting to try and remedy that problem.

4 THE COURT: And now you're good. Now you're  
5 good.

6 MR. LETTEN: But I'm having trouble hearing Your  
7 Honor.

8 THE COURT: Well, that's not so bad as long as we  
9 can hear you, but can you hear me now?

10 MR. LETTEN: Excuse me, sir. Would Your Honor  
11 give me just a second so I can reconnect, and I'm trying to  
12 fix an audio problem we have.

13 THE COURT: Please go right ahead.

14 MR. LETTEN: Thank you, sir.

15 MR. GLOVER: May it please the Court, just for  
16 the court reporter's purpose, I'll go ahead and say this is  
17 Mark Glover, who'll be -- rather than Bruce McMullen, I'll be  
18 examining on behalf of the City. Just so the court reporter  
19 will have that information when we begin.

20 THE COURT: I'm just going to check and make sure  
21 that Mr. Glover can hear me. Just to make sure I don't have  
22 a mic problem.

23 MR. GLOVER: Your Honor, I can hear you very  
24 well.

25 THE COURT: Thank you.

1 MR. LETTEN: Yes, sir. I'm trying to reopen the  
2 meeting.

3 THE COURT: Mr. Henegan, can you hear me okay?

4 THE WITNESS: Yes, sir. Yes, Your Honor, I can.  
5 Thank you very much.

6 THE COURT: We're fine. We're just going to  
7 wait, and we'll get this worked out.

8 Mr. Sample, how are we doing with our examiner?

9 THE CASE MANAGER: He's still unable to  
10 communicate directly with us, Your Honor.

11 THE COURT: Okay. Can we send him a second  
12 invitation?

13 THE CASE MANAGER: I can do that.

14 THE COURT: We're going to send a second  
15 invitation to our examining attorney, and that's probably  
16 going to take care of it.

17 THE CASE MANAGER: It's been sent, Your Honor.

18 THE COURT: Okay. We've sent that second  
19 invitation, and hopefully that will help us out there.

20 And we're going to let IT in the back come up  
21 close so we can solve the issue up here since I've got a few  
22 minutes to take care of that question.

23 We're going to take about a five-minute break  
24 because it looks like we need to give a chance for everything  
25 to get straightened out. So I'm going to actually go back to

1 mute, and I will go off video. And we'll come back in five  
2 minutes and see if we can't get that taken care of.

3 (Short break.)

4 THE COURT: All right. It looks like we do have  
5 everyone here. And counsel for, of course, the Monitor's  
6 team, we'll let you call your next witness, and we're going  
7 to get our witness sworn in.

8 MR. LETTEN: Thank you, sir. And once again,  
9 thank you for the Court's indulgence in taking care of that  
10 technical problem.

11 THE COURT: Glad to.

12 MR. LETTEN: The monitoring team would call to  
13 the witnesses stand expert witness John Henegan.

14 THE COURT: Okay. Mr. Henegan, if you'll raise  
15 your right hand, Mr. Sample is going to administer the oath.

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**TESTIMONY OF JOHN HENEGAN**

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\* \* \*

**JOHN HENEGAN,**

**was called as a witness and having first been duly sworn  
testified as follows:**

**DIRECT EXAMINATION**

**QUESTIONS BY MR. LETTEN:**

Q. Mr. Henegan, would you please state and spell your  
name for the record, please.

A. My name is John Clark Henegan. My last name is  
spelled H-E-N-E-G-A-N.

Q. Thank you, sir.

THE COURT: How do you spell Clark?

THE WITNESS: C-L-A-R-K.

THE COURT: Okay. Sometimes it has an e on it.  
How do you spell John?

THE WITNESS: J-O-H-N.

THE COURT: And of course, I spell it  
differently, so that's the reason we ask everybody to spell  
their full name.

THE WITNESS: Yes, Your Honor.

THE COURT: No problem. Counsel may proceed.

MR. LETTEN: Thank you, sir.

BY MR. LETTEN:

Q. Mr. Henegan, what's your profession? How are you  
employed presently?

**TESTIMONY OF JOHN HENEGAN**

21

1 A. I'm an attorney.

2 Q. And you're employed with the Butler Snow firm, Butler  
3 Snow LLP?

4 A. Yes.

5 Q. All right. Thank you, sir. Can you tell us where you  
6 were born and where you were raised, Mr. Henegan?

7 A. I was born in Mobile, Alabama in 1950. I was raised  
8 -- my first memories are -- I was raised in Memphis,  
9 Tennessee from the time that I was 2 until the time that I  
10 was 12. My mother died then, and I moved to McComb,  
11 Mississippi and lived with my aunt, who is my mother's oldest  
12 sister and -- my aunt and uncle. And I lived there until I  
13 graduated from high school.

14 And then after that, I returned to McComb one summer  
15 and have lived at different places, primarily Jackson,  
16 Mississippi, New York City, Washington -- actually Arlington,  
17 Virginia and then back to Jackson, Mississippi.

18 Q. Can you tell us where you went to undergrad?

19 A. I went to the University of Mississippi. I enrolled  
20 there in the fall of 1968. And I graduated in the spring of  
21 1972 with a degree, a bachelor of arts degree, a double major  
22 in English and philosophy.

23 Q. And did you go to law school immediately thereafter,  
24 sir?

25 A. No. I actually sat out a year and got married. I

**TESTIMONY OF JOHN HENEGAN**

22

1 worked for about six months, and then my wife and I went to  
2 Europe for four months and then returned to the United States  
3 in May and enrolled in law school at the University of  
4 Mississippi Law Center. That's the technical name of it.  
5 But the University of Mississippi law school in the summer of  
6 1973. And I graduated in May of 1976 from the University of  
7 Mississippi Law Center.

8 Q. So when you got your juris doctorate, did you graduate  
9 with honors, sir?

10 A. I did. I was second in my class, and I was editor in  
11 chief of the law journal.

12 Q. During your time in law school when you were editor in  
13 chief of the Mississippi Law Journal, can you tell us a  
14 little bit about the case notes, comments, articles you wrote  
15 about, the subject matter of those?

16 A. My -- you had to write on to be a member of the law  
17 journal at that time. And my case note was on a Alabama case  
18 that addressed the-- Alabama federal district court case  
19 that addressed the First Amendment right to gather the news,  
20 which was a novel concept at that time. And that case note  
21 was accepted, and it was published in the Mississippi Law  
22 Journal.

23 My other publication while I was on the journal was a  
24 comment, which was called a comment, written by students  
25 which was required before we could get credit for having

**TESTIMONY OF JOHN HENEGAN**

23

1 worked on the law journal. And that addressed the comment --  
2 excuse me -- the rights of minority shareholders in a closely  
3 held corporation. It did not relate to the First Amendment.  
4 There were comments written by students that we edited in  
5 different capacities of research done that addressed First  
6 Amendment issues that were pertinent and going on in  
7 Mississippi at the time.

8 Q. So it's fair to say that your deep interest in the  
9 First Amendment was rooted in law school; is that correct?

10 A. Well, it actually began before that. And I think I  
11 mentioned that the first time that I was on the stand with  
12 the Court in this case. Actually, when I was in  
13 undergraduate school, I was the -- I was an officer and a  
14 contributor to a magazine called Images. And the chancellor  
15 of Mississippi, after the magazine was printed and was about  
16 to be mailed, refused to allow the magazine to be published.  
17 And the students who were on the board of the magazine for  
18 Images, we went to the Northeast Mississippi Rural Legal  
19 Services, and we filed a suit asking -- against the  
20 University of Mississippi, asking that the magazine be  
21 published. So that was really my first interest in these  
22 issues.

23 Q. All right, sir. Now, let's go right into your  
24 practice after you graduated from law school. Tell us about  
25 your brief couple of positions that you held as a

**TESTIMONY OF JOHN HENEGAN**

24

1 practitioner right out of law school.

2 A. Well, immediately out of law school, I was a law  
3 clerk, judicial law clerk, to Honorable Charles Clark, who is  
4 a circuit judge on the United States Court of Appeals for the  
5 Fifth Circuit. And he lived in Jackson, so the clerks, at  
6 least back then, lived in the same city that the judge they  
7 clerked for lived. And so I returned to Jackson,  
8 Mississippi, and we lived in Jackson for a year, from August  
9 of 1976 until August of 1977. And as I said, I clerked for  
10 Judge Clark for one year.

11 Q. And after that, sir, where did your practice take you?  
12 Did you leave the south for a while?

13 A. I did. In October of 1977 I joined a law firm in New  
14 York City and was admitted -- took and was admitted to the  
15 New York bar, and I worked in New York City for two years.  
16 And then I went to their Washington, D.C. office and worked  
17 there for about a year and a half with the same law firm.

18 And in that regard, the work -- the subject matter  
19 area, I primarily worked for three or four clients, all who  
20 were in the telecommunications industry. And there were  
21 different components of First Amendment issues that arose  
22 during that representation. And just to -- one was the  
23 Noerr-Pennington doctrine, the right to petition the  
24 Government. And another one was the compelled speech  
25 doctrine.



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1 Q. Now, after that, did you find yourself in government  
2 service, specifically working for the governor of  
3 Mississippi?

4 A. Yes. In February of 1981, late February, I think it's  
5 February the 20th, is when I went on the payroll. I began  
6 working for the Honorable William F. Winter, who was the  
7 governor of Mississippi. My wife and I moved from Arlington,  
8 Virginia, and we returned to Jackson, Mississippi. And I  
9 became the governor's chief of staff.

10 Q. All right, sir. Did that involve any -- did the  
11 public service involve anything involving or touching or  
12 intersecting with First Amendment or other issues involving  
13 communications law?

14 A. It involved policy making. It involved drafting  
15 legislation. It involved dealing, working with the  
16 legislature with respect to legislation that addressed a wide  
17 subject matter. Possibly -- it also involved giving  
18 recommendations to the governor about whether certain bills  
19 implicated First Amendment issues, whether it be approved or  
20 not. And that -- specifically that was a liquor advertising  
21 deal that the legislature had passed.

22 And another example of some legislation that I worked  
23 on was that during his administration, the Mississippi Public  
24 Records Act of 1983 was adopted, and I worked on revisions to  
25 that legislation and then with both houses of the legislature

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1 in that being adopted.

2 Q. All right, sir. Mr. Henegan, when did you start with  
3 Butler Snow, the firm you're practicing with right now?

4 A. On January 1 of 1984. And I continuously -- I  
5 apologize -- but I've been continuously employed with Butler  
6 Snow, LLC since that time. It was originally Butler, Snow,  
7 O'Mara, Stevens & Cannada, and it was a partnership. And  
8 then as most firms have done, we shortened the name and  
9 changed to a limited liability company. And I was a partner  
10 in that firm, and then became a member when we had the  
11 transition to our present organization and present name.

12 Q. Can you tell the Court just a little bit about how you  
13 hit the ground running in 1984 in terms of the nature of your  
14 practice there and whether you were involved with the media  
15 companies and other types of publishing groups?

16 A. I became immediately involved in representing the  
17 media, the largest newspaper in Mississippi with respect to  
18 open meetings and public records legislation, became  
19 defending and participating in defending different newspapers  
20 in defamation and privacy actions. The -- began advising the  
21 Mississippi Press Association, members of the Mississippi  
22 Press Association on First Amendment-related issues of just a  
23 wide variety.

24 And over the course of time, acquired new clients who  
25 were sued in the state of Mississippi for defamation or

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1 invasion of privacy. These were national book publishers,  
2 national magazines. I became a member of the Media Law  
3 Resource Center. I believe that was in 19 -- the first  
4 meeting that they held that I attended was in 1984, in the  
5 fall of 1984. And every year since then, with the exception  
6 of about maybe five years, I've met with the defense counsel  
7 section of that organization and participated in seminars and  
8 meetings that we've had. As I say, every year except maybe  
9 about five. And usually when I didn't make those years, that  
10 was because of either an illness or because of a trial  
11 conflict.

12 Q. So sir, going back and looking at your practice to  
13 today over the years, has your practice in First Amendment  
14 and related law resulted in your routinely publishing  
15 articles and making presentations, doing workshops, in  
16 essence, all over the United States?

17 A. I have done a couple of workshops outside Mississippi,  
18 which they were national workshops in privacy and defamation.  
19 Most of the workshops I've been -- that I've done have been  
20 in the state of Mississippi. And they've been either on  
21 behalf of the Mississippi Press Association at different  
22 locations in the state of Mississippi, or they have been  
23 cosponsored with organizations such as the University of  
24 Mississippi School of Journalism, which I think was the most  
25 recent one that I've participated in. That may have been

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1 last year. I don't remember whether it was 2018 or 2019.

2 With respect to publications, I routinely publish  
3 articles that are in the Fourth Estate, which is the  
4 Mississippi Press Association quarterly newsletter. And I am  
5 asked to publish by the executive director about certain  
6 topics that are of interest to the members. And these  
7 articles are not only directed to the news side of the house,  
8 but they're directed to the business side of the house.

9 And with respect to advertisements that are being  
10 published that are received from customers and with respect  
11 to campaign ads that might be published, they're being  
12 submitted for publication. And there are different state  
13 campaign laws that apply to the rights and obligations of  
14 newspapers in publishing those kind of ads, so I give legal  
15 advice about that.

16 I give legal advice to the reporters, to the editors,  
17 to reporters who are covering the news, to reporters who are  
18 going on crime scenes and trying to take information related  
19 to what's happening at a crime scene. Or just the whole --  
20 reporters who are appearing in court, who are confronted with  
21 prior restraint issues. So that's the legal advice side.

22 I think I've strayed a little bit from the  
23 publications. I do want to mention we have a hotline for the  
24 Mississippi Press Association, and any member of the Press  
25 Association can call in to our hotline. It's -- the initial

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1 communication is by an e-mail, and they send us materials  
2 that they want to get legal advice on and ask that they give  
3 us a deadline. And we try to get -- we generally get back  
4 with them within four hours. Sometimes it may take 24 hours.

5 So the other publication that I have done is with the  
6 Media Law Resource Center in New York City. In 1988 they  
7 selected me to be the author of the Mississippi section on  
8 the law of defamation. And I have -- that has been published  
9 on an annual basis, is updated every year and has been  
10 published every year since 1988 through the present.

11 Q. All right. Mr. Henegan, perhaps my last question in  
12 this series of questions, I think, and for the Court, have  
13 you been involved in the enforcement of consent decrees prior  
14 to your engagement here?

15 A. Yes. And I believe I mentioned this the prior time  
16 that I was on the stand, but in connection with representing  
17 different media clients in Mississippi, I have in connection  
18 with filing open meetings lawsuits and public record  
19 lawsuits. I have obtained consent decrees on behalf of  
20 different newspapers in different parts of the state. So I  
21 have actually participated in the drafting of consent decrees  
22 and the approval process that's necessary with the Court in  
23 that area.

24 Q. Thank you, sir. Now, are you testifying here today as  
25 a member of the monitoring team specifically as the subject

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1 matter expert in constitutional First Amendment issues?

2 A. Yes, I am.

3 Q. And have you been in that capacity as subject matter  
4 expert since December of 2018 when the Monitor and the team  
5 was appointed by His Honor?

6 A. Yes.

7 Q. Now, as the Monitor's First Amendment subject matter  
8 expert for the team, are you prepared to render an expert  
9 opinion on and address the City's and MPD's proposed changes  
10 that are set forth in a couple of documents? One of which is  
11 the joint notice.

12 MR. LETTEN: Which, I believe, Your Honor, is in  
13 the record. It is MT Demonstrative F, as in foxtrot.

14 BY MR. LETTEN:

15 Q. Is that correct, sir?

16 A. Yes.

17 Q. And also three proposed definitions, which you're  
18 going to testify about and the proposed modified order.

19 MR. LETTEN: Which, I believe is, for the record,  
20 Your Honor, that's a demonstrative also. That's  
21 MT Demonstrative G, as in golf.

22 BY MR. LETTEN:

23 Q. Is that right, sir?

24 A. Yes.

25 THE COURT: Demonstratives should be marked as

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1 exhibits and submitted, and so we need to do that.

2 MR. LETTEN: Yes, sir. These are -- even though  
3 they're part of the record, we would offer these, Your Honor,  
4 and move these, with this Court's permission.

5 THE COURT: Right. We just need to make sure  
6 that we have them as part of the hearing record, and so I'll  
7 let you figure that out.

8 MR. LETTEN: Yes, sir. Thank you, sir.

9 THE COURT: If you have a reference to a  
10 particular document and a page ID number, then we can pull  
11 those and mark them. Just keep that in mind. You may want  
12 somebody working on that while we go ahead.

13 MR. LETTEN: Yes, sir.

14 BY MR. LETTEN:

15 Q. Now, Mr. Henegan, I'll refer you to the joint notice  
16 of filing, which is Consent Decree Demonstrative F, which  
17 I've just mentioned. I don't know if we need to pull that up  
18 just yet. But in your role, the question about in your role  
19 as First Amendment expert, will you be offering your opinion  
20 with regard to 17 proposed changes, which are summarized in  
21 that document, in that joint notice?

22 A. Yes, I will.

23 THE COURT: Right. And you're referring to  
24 Document 327 in the record, which begins at page ID 9951; is  
25 that correct?

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1 MR. LETTEN: Yes, sir, that is, Your Honor.  
2 That's Document ECF Document 327. That's correct, sir.

3 THE COURT: Right. Exactly. And we just need to  
4 make sure that everybody can find that. Sure. Go ahead.

5 MR. LETTEN: Yes, sir.

6 BY MR. LETTEN:

7 Q. And also, sir, will that testimony also include your  
8 opinions on the parties' joint submission, that includes some  
9 items that the parties were not able to agree upon to-date?

10 A. Yes.

11 Q. All right. Did you also consider additional  
12 submissions in the proposed modified Consent Decree beyond  
13 those? Specifically, sir, did you consider and will you  
14 testify about three of the new proposed definitions in  
15 Section B, as in bravo, of the Decree and which are used and  
16 thus incorporated by reference in remaining provisions, which  
17 we'll talk about?

18 A. Yes, I will.

19 Q. First, sir, let's get into the definitions, if we  
20 will. I'd like to refer you to --

21 MR. GLOVER: Your Honor, at this point -- excuse  
22 me for my interruption. I'd like to make an objection, if I  
23 may, respectfully, and a motion. And it is basically this.  
24 While -- and I say this with all due respect. I believe  
25 Mr. Henegan to be an outstanding lawyer, and he is by



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1 reputation. The groundwork laid for his testimony was that  
2 he is a lawyer who practices in First Amendment areas, not  
3 necessarily --

4 THE COURT: Excuse me. Do you wish to conduct  
5 voir dire?

6 MR. GLOVER: I would like to conduct voir dire.

7 THE COURT: I think that's probably the thing to  
8 do. And counsel actually should have probably tendered him,  
9 and then we should allow you to have voir dire.

10 MR. GLOVER: Thank you, Your Honor.

11 THE COURT: So let's do that.

12 MR. GLOVER: Thank you, Your Honor.

13 THE COURT: Sure. Of course, that's -- go right  
14 ahead, Mr. Glover. Absolutely, you're entitled to make  
15 inquiry.

16 **VOIR DIRE EXAMINATION**

17 **QUESTIONS BY MR. GLOVER:**

18 Q. Have you ever worked as an expert who's offered expert  
19 testimony in a court of record on a First Amendment issue?

20 A. I have never been a forensic witness on that subject  
21 matter.

22 Q. Has any court of record ever recognized you as a  
23 witness with expertise which qualified you to give First  
24 Amendment law opinions?

25 A. I have never been retained as a forensic witness to

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1 offer expert testimony in that area, and so the answer is no.

2 Q. All right, sir. You are familiar as a practicing  
3 lawyer with the rules about the expert witness role and  
4 limitation in offering legal opinions as opposed to opinions  
5 that are related to technical, scientific or experiential  
6 matters that are outside the province of the normal court.  
7 In other words, the prohibition on giving legal opinions as  
8 an expert opinion?

9 A. I'm not sure what you're referring to. I'm familiar  
10 with Daubert, and I'm familiar with the rules, the Federal  
11 Rules of Evidence related to, you know, 702 and 703. I do  
12 think I have specialized knowledge in this area. And I do  
13 think that I've used a methodology that's appropriate for  
14 examining the proposed language in the Consent Decree and  
15 providing opinions that might be of value to the Court in  
16 connection with the issues that are before the Court. I was  
17 not asked to prepare an expert report in connection with this  
18 litigation. I don't know if that's responsive to your  
19 questions.

20 Q. It is in part, but I guess my question is -- and I'm  
21 trying to understand how you intend to testify because  
22 perhaps I may have misunderstood. But you're familiar and  
23 agree with the concept that because the Judge's special  
24 knowledge on the law is presumed to be sufficient. A  
25 witness, either a lay witness or an attorney, do you agree,

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1 is not normally allowed to give opinions on what the law is  
2 or what the Judge ought to decide in a case?

3 A. I'm certainly not going to suggest to Judge McCalla  
4 how he should decide this case.

5 Q. But you understand that the ultimate issue in this  
6 case and which depends on this motion is whether or not  
7 proposed modifications should be allowed and then whether the  
8 particular modifications are appropriate or should be  
9 different. And you would agree that that's something that  
10 Judge McCalla is capable of reviewing and looking at, do you  
11 not?

12 A. Yes, absolutely.

13 Q. Do you claim to have any additional legal knowledge  
14 with regard to the language of this Consent Decree or of the  
15 First Amendment generally that is greater than what you think  
16 the Court already has and would aid the Court in that way?

17 MR. LETTEN: Your Honor, I'm going to object to  
18 the form of that question on the basis of the counsel's  
19 assertion that the witness believes that he has knowledge  
20 beyond that which the Court has, and that's never been  
21 suggested. That is not contemplated under Rule 702 or 703.

22 This witness is simply being tendered as an  
23 expert in the First Amendment and First Amendment law, and we  
24 expect to elicit from this witness, respectfully, Your Honor,  
25 his reactions to and his opinions about certain proposals and

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1 whether or not those comport with his understanding of the  
2 First Amendment. He will never purport to opine on what the  
3 ultimate Court's decision should be in this matter. And so I  
4 just want the record to be clear on that.

5 THE COURT: Well, I think that is clear. I don't  
6 think that Mr. Glover is indicating that that's the problem.

7 Go ahead, Mr. Glover.

8 MR. GLOVER: Thank you, Your Honor. I'm sorry.  
9 On this video, and I apologize, if I ever talk over the  
10 Court, I apologize, it's because of my inarticulate ability  
11 to deal with the video as opposed to intending to be rude.  
12 And so I apologize that I just did that.

13 But what I -- and I understand the objection and,  
14 in fact, I am not seeking that. I am trying to determine  
15 what opinions this witness has by virtue of his expertise  
16 that can reasonably be viewed to assist the Court in reaching  
17 the determination it has to have. In my assertion is that,  
18 if it is nothing more than what the Court already knows, as a  
19 constitutional law scholar, then it's really lawyer argument  
20 coming from a witness now.

21 THE COURT: I understand what you're saying. And  
22 of course, everybody is familiar with the fact that  
23 generally, what Mr. Glover says is correct. At the same  
24 time, the Monitor's team did have available Mr. Henegan as it  
25 proceeded through certain analogies. And in that sense, it

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1 may be helpful to understand the team's perspective.

2           Of course, I agree with you that the Court will  
3 decide this. And the Court has a fair amount of experience  
4 in the First Amendment -- a lot of experience in the First  
5 Amendment area. And with all due deference to Mr. Henegan, I  
6 don't think he even believes at all that we will be making a  
7 decision based on his presentation as to what the law is in  
8 this area.

9           Now, I think it does help the Court to understand  
10 the role that Mr. Henegan played with the team. And I think  
11 that we have broad discretion. This is not a jury trial. I  
12 understand the objection. And basically, we're dealing with  
13 the 700 series of rules, dealing with 703 and the basis of  
14 the opinion in part. We're also dealing with a complex  
15 relationship in terms of team analysis. That is of some  
16 interest to the Court. Not that it's going to affect the  
17 Court's ultimate determination in terms of certain legal  
18 issues.

19           So what I'm going to do is I'm going to allow the  
20 inquiry. We can give it what weight that we need to give it,  
21 understanding the limitations in this system. In other  
22 systems where we have issues of foreign law, we are allowed  
23 to receive declarations, as the law of England or France or  
24 Germany or Japan or China. This is not that situation. And  
25 I think that, Mr. Letten, you understand that, right?

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1 MR. LETTEN: Yes, sir.

2 THE COURT: Okay. I'm not exactly sure -- I'm  
3 going to let you go ahead because there may be issues that  
4 you want to cover. And I think it relates to analysis as to  
5 the proposed modifications; is that right?

6 MR. LETTEN: That's precisely correct, sir.

7 THE COURT: Okay. Well, I understand that. And  
8 I also agree with Mr. Glover that the Court will make the  
9 ultimate decisions here. But it's really a different  
10 question, and I'm going to let you pursue it.

11 MR. LETTEN: Thank you, sir. So with that, we'll  
12 have tendered the witness as an expert. And with the Court's  
13 permission, we will proceed. Thank you, sir.

14 THE COURT: All right.

15 **CONTINUED DIRECT EXAMINATION**

16 **QUESTIONS BY MR. LETTEN:**

17 Q. Mr. Henegan, first, sir, I'll, in my next series of  
18 questions, I'm going to refer to three of the definitions  
19 which have been proposed, and we'll talk about those in which  
20 the Monitor and you as First Amendment expert have done an  
21 analysis of and considered. So I'll ask you to examine an  
22 exhibit.

23 MR. LETTEN: And if our tech folks will pull up  
24 Exhibit MT Demonstrative Exhibit G, as in golf, which is  
25 originally ECF 327-1.

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1 THE COURT: Sure.

2 MR. LETTEN: You can pull that up. All right,  
3 sir.

4 Your Honor, this has been made available to the  
5 parties. This has actually, it has been submitted by the  
6 parties.

7 BY MR. LETTEN:

8 Q. Sir, do you recognize this document, Mr. Henegan?

9 A. I do.

10 Q. Did you have a chance to examine this document?

11 A. I did.

12 Q. This document, is it not, sir, the proposed modified  
13 order judgment and Decree submitted by the parties in this  
14 matter with its proposed edits and changes to, that the  
15 parties suggest the Court accept and make to the Consent  
16 Decree, the existing Kendrick Consent Decree; is that  
17 correct, sir?

18 A. Yes, it is.

19 Q. Now, this document, just for the record --

20 THE COURT: And this is actually previously  
21 marked as Exhibit 6 in the proceeding. It should be referred  
22 to in that way.

23 MR. LETTEN: Okay. Exhibit 6. All right.

24 BY MR. LETTEN:

25 Q. Now, Mr. Henegan, having done an analysis of the

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1 proposals in that document, that's what we call the clean  
2 document. Did you have occasion to use that as a basis, that  
3 very document, that very Exhibit Number 6 and in essence  
4 commit to it your, in some instances, where there are  
5 proposals, your analysis, your opinions, as a First Amendment  
6 expert, and in some cases, suggestions or proposed  
7 modifications?

8 A. Yes, I did.

9 Q. All right, sir.

10 MR. LETTEN: I will now and I'll ask our tech  
11 folks to pull up a document that has not been admitted yet.

12 I believe that the numbers we've been given by  
13 the Court, Your Honor, are MT trial Exhibit 10. This is --

14 THE COURT: I'm going to be really clear about  
15 this.

16 MR. LETTEN: Yes, Your Honor.

17 THE COURT: It doesn't matter what numbers you  
18 put on them. It's the numbers that the Court is using  
19 because the record will be indecipherable and confusing.

20 MR. LETTEN: Yes, sir.

21 THE COURT: So this is Exhibit 6 in the  
22 proceeding, I believe.

23 MR. LETTEN: If I may get clarification, Your  
24 Honor, Exhibit 6 is the one we just did. This is actually  
25 one that's been modified by Mr. Henegan that we would like to



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1 use separately, if Your Honor would allow it.

2 THE COURT: That will be the next numbered  
3 exhibit. That's fine. We just have to keep an orderly  
4 process. And this will be modified, and I want to make sure  
5 it's not already marked. And that will become Exhibit 17.  
6 Otherwise somebody --

7 MR. LETTEN: Will you repeat that? I've got to  
8 get the number.

9 THE COURT: 17.

10 MR. LETTEN: 17.

11 THE COURT: Okay. That's fine. It's just very  
12 helpful to keep them in sequential order.

13 MR. LETTEN: Yes, sir.

14 THE COURT: And we'll mark that one.

15 MR. LETTEN: Thank you, Your Honor.

16 THE COURT: Oh, no problem. We're going to mark  
17 that, Mr. Sample, as 17.

18 (WHEREUPON, the above-mentioned document was  
19 marked as Exhibit Number 17.)

20 BY MR. LETTEN:

21 Q. With the Court's permission, will you examine this  
22 document and tell me if you are familiar with it.

23 A. Yes, I am. This is a copy of 327-1 that was filed by  
24 the parties on the dates there on June the 8th, 2020. And I  
25 took that copy and made proposed modifications or that are in

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1 track changes in blue. And they appear in the document  
2 wherever there were matters that -- I was asked to look at  
3 this from a First Amendment perspective. And those  
4 modifications are inserted and included in the document. And  
5 --

6 Q. All right, sir. I'm sorry. Go ahead.

7 A. And where I expressed concerns about the language, I  
8 tried to express the basis for the concerns in a summary way,  
9 and then in certain instances, I suggested proposed  
10 alternatives to what appeared in the document, and those  
11 appear in the document as well.

12 Q. All right, sir. Now, is it fair to say that the  
13 observations which you have noted in the document --

14 MR. LETTEN: By the way, Your Honor, this  
15 document has been previously provided to the parties, to  
16 counsel.

17 THE COURT: Right. Right.

18 BY MR. LETTEN:

19 Q. Those notations are based upon your First Amendment  
20 knowledge, and those notations are the result of and  
21 consisting of simply First Amendment analysis with your, in  
22 some cases, your suggestions having to do with alternative  
23 drafting suggestions, not legal conclusions; is that correct,  
24 sir?

25 A. That's correct. Let me say this for the Court. I

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1 hope that this will be helpful. In connection with preparing  
2 this, I viewed, of course, the original Consent Decree. I  
3 viewed the orders of the Court. Not only viewed them but I  
4 studied them. Orders 120, 150, 152, 250, 305.

5 I viewed the joint prehearing briefs submitted both by  
6 the ACLU and by the City of Memphis. I also viewed the  
7 document that is -- I'm sorry -- I don't recall what the  
8 number of it is, but it's Document 327. It's filed in the  
9 record, which was that joint notice, which had the 17  
10 proposals in it. And then I reviewed the proposed modified  
11 Decree submitted by the parties jointly, that was 327-1.

12 Q. All right, sir.

13 MR. LETTEN: And with that, Your Honor, I have --  
14 I'm sorry.

15 MR. GLOVER: I'm sorry. I have an objection that  
16 I'd like to just renew, but having heard more foundation, I  
17 think it may now be a separate motion. The process that the  
18 witness has described is precisely the Court's province. To  
19 review the various documents, to look at the First Amendment  
20 and then to give a ruling on what is and isn't appropriate  
21 and what should be done.

22 And this witness has testified that what he has  
23 done and what he has looked at is exactly the province of the  
24 Court, except he's doing it without the benefit that the  
25 Court has of all the testimony from the trial and the prior

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1 involvement in the case. So I just renew my objection to the  
2 tender of his evidence that's now in this Exhibit 17 and any  
3 oral testimony he may give about it.

4 MR. LETTEN: Your Honor, the Monitor is prepared  
5 to respond unless the Court is prepared to rule.

6 THE COURT: No. Go ahead and respond.

7 MR. LETTEN: Your Honor, this witness was  
8 appointed by this Court as part of the monitoring team to  
9 augment the Monitor's mission and the Monitor's very mission,  
10 Your Honor, in a matter that solely involves the protection  
11 of the First Amendment of the Constitution of the United  
12 States. This mission is -- can only be carried out by the  
13 Monitor by virtue of having the benefit of an expert in First  
14 Amendment, not just First Amendment law, but in the First  
15 Amendment in all of its aspects.

16 In this case, Your Honor, the Monitor can only  
17 advise this Court as the eyes and ears of this Court  
18 regarding suggestions, modifications made by one or the other  
19 party or in some cases both, with the benefit of someone like  
20 Mr. Henegan who understands intimately the First Amendment,  
21 its history, its application.

22 In this case, Your Honor, without the benefit of  
23 the impressions of a First Amendment expert or these  
24 submissions by the parties, the Monitor would be virtually  
25 unable to carry out his mission with the Court of being the

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1 eyes and ears of the Court and advising the Court of some of  
2 the either the criticisms of some of the proposed changes.  
3 Perhaps suggested other changes, in some cases agreeing with  
4 those, which, of course, is the case with some of these. And  
5 simply providing an opinion about both the efficacy and  
6 appropriateness of some of those. And maybe in some cases  
7 how some of these things can be done maybe a little bit  
8 better. A little bit more comporting with the First  
9 Amendment.

10 And so we believe this is not just appropriate,  
11 but this is imminently appropriate. And this work product is  
12 tantamount to an expert's report.

13 THE COURT: Well, the fact is that Mr. Glover has  
14 the better argument here. The Court, with all due respect,  
15 does not rely on individuals who are not advocates in the  
16 case and filing briefs to determine what the law is in this  
17 area. Doesn't want to sound like courts don't listen. We  
18 do, but normally in the adversarial process, the information  
19 and the argument comes from the parties and not from an  
20 expert submitting this type of information.

21 Now, what we're going to do, and it's just --  
22 this is a little awkward. I will tell you that if we had a  
23 jury, I would exclude the witness because it would be  
24 confusing under 403, and it would be an inappropriate  
25 submittal of a method for resolution of legal matters to the

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1 jury. The Court is not unaware of those limitations and is  
2 not going to be influenced in any inappropriate way by  
3 letting this record be developed.

4 I was somewhat interested in how the Monitor  
5 reached the Monitor's conclusions, and this might shed some  
6 light in that regard. However, I agree that Mr. Glover's  
7 position is the correct one in terms of analysis. But  
8 because of the posture of the case and because frankly, the  
9 Court would like to have a complete record as opposed to  
10 having proffers submitted, I think we should allow the  
11 testimony to be developed and let Mr. Glover have an  
12 opportunity to cross examine, if he wishes to do so.

13 So with that understanding, I'm going to allow  
14 you to go ahead and complete the record on this issue. But I  
15 hope I've been clear that the objection raised by the City in  
16 this circumstance is certainly an appropriate objection.

17 So Mr. Glover, I think we ought to complete the  
18 record here, in case there's ever some issue about that. But  
19 other than that, I don't know that there's another purpose in  
20 this matter.

21 Mr. Glover, anything else from you on this point?

22 MR. GLOVER: I think I understand Your Honor's  
23 ruling, and I understand it's not exactly in the nature of an  
24 offer of proof but a similar kind of situation.

25 THE COURT: Correct.

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1                   MR. GLOVER: But rather than interrupt anymore,  
2 I'd like to just have a standing objection to -- because Your  
3 Honor knows when a witness is offering legal analysis and  
4 when he isn't. And I don't want to interrupt the record by  
5 each time he gives an opinion making the same objection. So  
6 I will do that if I need to, but may I have a standing  
7 objection to all the testimony about what the law provides  
8 these sections should do?

9                   THE COURT: You may. And essentially you have  
10 prevailed on your motion, but we're completing the record.  
11 That's the Court's view on that.

12                  MR. GLOVER: Thank you.

13                  THE COURT: Certainly. So we're going to handle  
14 it in that way.

15                  Counsel may proceed.

16                  MR. STANTON: Your Honor, if I may and I  
17 apologize as the Monitor. If I may, Your Honor, I hear the  
18 Court loudly and clearly, and I believe that this is -- I  
19 know we're maybe 15 minutes or so off of our first break, but  
20 I believe this is something in the interest of time that we  
21 can clear up if we have just a few moments, five minutes or  
22 at our next break, Your Honor, with regard to proceeding.

23                  THE COURT: Well, I tell you what. Let's take a  
24 15 regular break, 15-minute regular break at this time for  
25 the morning. In fact, we'll make it -- add three minutes to

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1 that, so it will be an 18-minute break, and we'll come back  
2 at 25 until the hour. And that may be time well spent.

3 So this is our morning break at this time. And I  
4 think we will -- I'm going to disconnect, not leave the  
5 event, but I'm going to put it on mute and disconnect the  
6 video. So 17 minutes from now, we'll revisualize everyone.  
7 Thank you.

8 (Short break.)

9 THE COURT: All right. We have everybody back.  
10 We've had a break. And we'll go back to Mr. Letten, and  
11 Mr. Letten, where are we on this matter?

12 MR. LETTEN: (No verbal response.)

13 MR. STANTON: I'm sorry, Judge McCalla. We  
14 couldn't hear you. Can you hear me?

15 THE COURT: Let me check and see, Mr. Castelli.  
16 Can you hear me, Mr. Castelli?

17 MR. CASTELLI: (No verbal response.)

18 MR. GLOVER: The City is unable to hear you  
19 either.

20 THE COURT: I am not on mute. Okay. Mr. Sample,  
21 I'm going to disconnect and connect again. I just  
22 disconnected and reconnected. Did that work?

23 MR. LETTEN: Yes. It's showing Judge McCalla is  
24 unmuted.

25 THE COURT: Well, obviously, we need to get that



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1 fixed. Where's our person here from IT?

2 THE CASE MANAGER: You should be unmuted now,  
3 Judge.

4 THE COURT: We're going to try one more time.  
5 Mr. Castelli? No, they cannot hear. One more time. Going  
6 to try that. No, Mr. Castelli, we're not getting through.

7 THE CASE MANAGER: I'm showing you're unmuted,  
8 Your Honor.

9 THE COURT: I am too. You can stay here,  
10 Mr. Sample, it doesn't matter. Let's try that. Is that  
11 better?

12 THE CASE MANAGER: Let me see if we can turn mine  
13 up, Judge.

14 MR. LETTEN: Do we have audio?

15 THE COURT: I can hear everyone. We'll go on and  
16 tell them I can hear everyone. We'll try one more time.

17 Okay. Mr. Sample, go ahead and tell them I can  
18 hear everyone and we're waiting.

19 We had to go back in and change what we were  
20 doing. So I think we're all ready. And IT is going to stay  
21 a little closer with us today.

22 Okay. Well, Mr. Letten, we're back to you again.

23 MR. LETTEN: Yes, sir.

24 MR. GLOVER: Your Honor?

25 MR. STANTON: Your Honor, I'm sorry. I'm going

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1 to turn it back over to Mr. Letten. One, I just want to say  
2 thank you for indulging us for the brief recess here. In  
3 light of Mr. Glover's objection and renewed objection but  
4 more importantly, Your Honor, this Court's ruling and  
5 analysis of the scope and nature of Mr. Henegan's testimony,  
6 I've instructed Mr. Letten with the examination to narrowly  
7 modify that line of questioning. So Mr. Letten has a few  
8 other brief questions. But with regard to being judicious  
9 with our time and mindful, Your Honor, that testimony will be  
10 narrowly tailored this morning. And I will turn it back over  
11 to Mr. Letten, if that's okay.

12 THE COURT: Absolutely. Well, thank you so much.

13 Mr. Letten, yes, sir, looks like you have a short  
14 exam, so thank you.

15 MR. LETTEN: I do. Thank you, sir.

16 BY MR. LETTEN:

17 Q. Mr. Henegan, do you understand you're still under  
18 oath?

19 A. I do.

20 Q. All right, sir. Now, very briefly, as the subject  
21 matter expert in First Amendment matters to the team, during  
22 the entire duration of your assignment with the team, have  
23 you been available at all times, every day, literally every  
24 week to consult with the Monitor himself, with the members of  
25 the monitoring team on any and all issues involving the First

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1 Amendment, any and all proposals that may have been made or  
2 suggested by either of the parties and any and -- and provide  
3 analyses and opinions to the Monitor to inform his opinions  
4 regarding those things?

5 A. Yes, I have.

6 Q. Have you also had the opportunity to meet when asked  
7 with and communicate with the parties at various times and/or  
8 to review some of their suggestions and in some cases to  
9 share either with the Monitor or indirectly with the parties  
10 what your opinions are?

11 A. Yes.

12 MR. LETTEN: With that, Your Honor, I -- let me  
13 ask you one more question.

14 BY MR. LETTEN:

15 Q. Have you been available to the parties and also the  
16 Monitor at all times to consult, to analyze and to provide  
17 opinions regarding proposals for the Consent Decree and any  
18 language that might involve First Amendment issues?

19 A. Yes, I have.

20 Q. And to your knowledge, has the Monitor relied on you  
21 and your analyses in fashioning recommendations to the Court  
22 as well as the analyses and opinions of the other subject  
23 matter experts in their respective fields?

24 A. Yes, I believe he has.

25 MR. LETTEN: Thank you, sir. I believe that does

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1 it, Your Honor.

2 THE COURT: Certainly.

3 Mr. Glover, cross examination?

4 MR. GLOVER: Thank you, Your Honor. And I think  
5 my cross examination depends in part upon whether there's  
6 been a tender of Exhibit 17 that contains a good number of  
7 narrative comments and explanations and legal analyses by  
8 Mr. Henegan or whether that's being withdrawn. If it's being  
9 withdrawn, I have questions. If it's in the record, even as  
10 a tender, I'd like to cross examine Mr. Henegan on those  
11 representations.

12 MR. STANTON: That's withdrawn, Mr. Glover.

13 THE COURT: Exactly.

14 MR. GLOVER: I have no questions, Your Honor.

15 THE COURT: We're going to mark 17 as now  
16 withdrawn.

17 (Whereupon, Exhibit 17 was withdrawn.)

18 THE COURT: It's going to leave a -- it's still  
19 going to exist as a withdrawn item, so we'll go to 18 for our  
20 next number. It's not -- otherwise, it would be very  
21 confusing later on to somebody looking at the record. Okay.

22 MR. STANTON: Thank you, Your Honor.

23 THE COURT: Let me ask if the ACLU, any questions  
24 here?

25 MR. CASTELLI: No, Your Honor. In light of that

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1 clarification with Exhibit 17, we have no questions.

2 THE COURT: Okay. Well, will there be any  
3 additional evidence or any additional witnesses presented by  
4 the Monitor and the Monitor's team?

5 MR. STANTON: No, Your Honor. That concludes the  
6 monitoring team's report and presentation at this time.

7 THE COURT: All right. Is the City prepared to  
8 proceed with any witnesses that you wish to call?

9 MR. GLOVER: Your Honor, we will and Mr. McMullen  
10 will be calling the first witness, who is going to be  
11 Director Rallings, who we'll bring in the room now, and I'll  
12 trade chairs with Mr. McMullen.

13 THE COURT: Certainly. That's fine. All right.  
14 And I see Mr. McMullen, and I'm looking for my witness on the  
15 screen.

16 Director, do we have you at this time?

17 MR. MCMULLEN: Not yet, Your Honor.

18 THE COURT: Okay. That's fine.

19 Director, you've been called as a witness, and so  
20 always good to see you, but I need to have your raise your  
21 right hand, and Mr. Sample will administer the oath.

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\* \* \*

**MICHAEL RALLINGS,**

**was called as a witness and having first been duly sworn  
testified as follows:**

THE COURT: Counsel may proceed.

**DIRECT EXAMINATION**

**QUESTIONS BY MR. MCMULLEN:**

Q. Director Rallings, I want you to introduce yourself.

MR. MCMULLEN: Your Honor, could you bear with  
us. We've got some audio feedback. We're trying to correct  
it.

THE COURT: Certainly. Go right ahead.

BY MR. MCMULLEN:

Q. Director Rallings, would you please introduce yourself  
to the Court.

A. Yes. My name is Michael Rallings. I'm the director  
of police services for the Memphis Police Department.

Q. By way of background, can you briefly go over your  
career in law enforcement, your exposures and your  
experiences?

A. Yes. So I have been a law enforcement officer for  
approximately 30-plus years now. I've served in the position  
as police director since 2016. I'm scheduled to retire in  
ten months. And throughout my law enforcement career, I've  
had a very broad and vast training experience.

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1 I started as a patrol officer, working undercover as a  
2 narcotics agent. I have served in uniform patrol. I was  
3 sent to the Training Academy and stayed at the Training  
4 Academy and the Firearms Training Unit for probably ten  
5 years, to include being promoted to sergeant, to lieutenant  
6 and as training commander. I've served in the detective  
7 bureau. I've served as a field supervisor. I've served as a  
8 precinct commander.

9 And I've been a part of the MPD command staff since  
10 2009 when Director Larry Godwin promoted me to deputy chief  
11 for our supervised Uniform Patrol District 1. I've  
12 supervised Uniform Patrol District 2. I've supervised  
13 Special Operations, and I have again served as the director  
14 of police services since 2016 for the Memphis Police  
15 Department.

16 Q. Give us the benefit of some of the training that  
17 you've had outside of Memphis Police Department with certain  
18 law enforcement agencies on becoming more efficient, better  
19 in the use of tools for effective law enforcement.

20 A. Yes, sir. Well, the first thing I have to talk about  
21 is my 30-and-a-half years serving in the United States  
22 military. I joined active duty in 1984 after high school. I  
23 served in the infantry and military police, but I also  
24 completed 26 years in the United States Army Reserve as a  
25 leadership instructor. I also taught advanced courses in

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1 military police and leadership courses for the military.

2           So my military career has given me a remarkable  
3 foundation for the work that I do today. And I can't, you  
4 know, recount all the training I've had in the military.  
5 Plus I've been able to serve in the military in law  
6 enforcement. I joined the police department in 1990, so I've  
7 been able to serve in the police department at the same time.

8           So as a police officer because of my time at the  
9 Training Academy, I'm certified in a vast amount of things  
10 through the Tennessee P.O.S.T. Commission, such as use of  
11 force, less-lethal munitions, crowd control and civil  
12 disturbance. You know, basic firearms, advanced firearms,  
13 anti-terrorism.

14           And so I have continued training as of, you know, last  
15 year where I attended the FBI National Executive Institute.  
16 One -- a fortunate thing about that is I've been able to sit  
17 and talk to a number of law enforcement leaders. Also the  
18 vice president of the United States, Vice President Pence.  
19 Former Attorney General Jeff Sessions. Current Attorney  
20 General William Barr. You know, Director Comey, former  
21 director of the FBI, I've sat in his office. And we've  
22 talked about, you know, current events and crime. The  
23 current director, Director Wray. You know, the governor of  
24 Tennessee. I mean, it's just the list goes on and on. So  
25 I've been afforded an amazing opportunity to work with law



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1 enforcement leaders from not all over across the nation but  
2 also the world.

3 And so I think I do bring something to the table. Not  
4 just a vast understanding of what it's like to be a law  
5 enforcement executive in a large city, but what it's like to  
6 be an African-American executive in a city that is  
7 predominantly African-American. So I'm a Memphian. I think  
8 I bring a lot to the table. And I'm just happy to serve in  
9 this capacity, especially during these uncertain times.

10 Q. Let's talk about the Memphis Police Department  
11 organization. Could you give the Court a brief description  
12 of how large the Memphis Police Department is and its  
13 different departments and how they function, just a brief  
14 overview.

15 A. Yes. So the Memphis Police Department is probably the  
16 27th largest law enforcement agency in the nation. We're  
17 certainly the largest law enforcement agency in the state of  
18 Tennessee. Today we have approximately 2,056 commissioned  
19 police officers, but we have just about 3,000 employees to  
20 include our dispatchers, our school crossing guards and our  
21 other civilian employees, our police service technicians and  
22 also the police reserves.

23 We have 50-plus recruits still in the academy. So  
24 upon their graduation, we probably will be approximately 2100  
25 commissioned police officers. The Memphis Police Department

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1 is a full-service organization. Each year you have  
2 approximately 1.6 million calls come into our 911 call  
3 centers. Officers dispatched on probably 940,000 calls.  
4 Those calls generally involve anywhere from 1.6 million to  
5 2.5 million officers having encounters with citizens due to  
6 the high volume of calls and the nature of calls.

7 Each year we are taking in approximately 108,000  
8 incident reports. I think last year 118,000 were filed, but  
9 if you look at the average, it's an average of 108,000  
10 incident reports filed every year. Probably around 35,000  
11 traffic crashes. We answer almost every call that comes into  
12 the call center either through 911 or through the 544-COPS  
13 nonemergency number.

14 So we consider ourselves, again, to be a full-service  
15 police department in one of the most challenged cities in the  
16 nation, just due to the volume, the frequency, the rate and  
17 severity of violent crime. Of course, also the challenge of  
18 property crime.

19 Q. And you talk about some of the things that you do.  
20 How many criminal investigations do y'all do a year?

21 A. So when I talked about those incident reports filed,  
22 118,000 filed last year, those are all criminal complaints.  
23 Well, some of them may be memos that may not turn out to be  
24 criminal, but you know, I would dare say at least a hundred  
25 thousand of those are -- end up being some type of criminal

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1 offense that will warrant some type of investigation or  
2 review.

3 Q. Tell me about how important technology is, even though  
4 the police department is about 20 -- well, about 2,000  
5 officers. You serve as -- first of all, how many citizens in  
6 Memphis in your service area?

7 A. Yeah. So if you think about the City of Memphis, I  
8 think, according to the latest census, we're talking about  
9 650,000 citizens. But when you talk about the number of  
10 people that travel through the city, the importance of the  
11 city in the United States, a distribution center is rather  
12 amazing. I think I looked at some statistics where we're  
13 responding to interstate shootings. And I think the  
14 statistics reported that anywhere from 70 million to  
15 77 million people travel through the interstates. If you  
16 think we're very kind of oddly situated in that we're  
17 bordered by Mississippi, Arkansas. Memphis is in the middle.

18 So the extremely large volume of tourism, but also  
19 large volume of individuals traveling through our highways  
20 and byways, through our rails, through our airports, et  
21 cetera. So Memphis is an important city in the nation. Not  
22 including the traffic up and down the main corridor from, you  
23 think, St. Louis all the way down to New Orleans as far as  
24 intertravel on the Mississippi River.

25 Q. Geographically, how big a area is Memphis that you are

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1 responsible for patrolling and keeping safe?

2 A. Well, that's a great question. You know that we're --  
3 have done a small amount of de-annexation, but last I  
4 checked, I think we're anywhere from 324 to 340 square miles.  
5 So the volume of Memphis, the size of the city, given the  
6 travel time from one end of the city to the other is  
7 enormous. And a lot of people try to compare Memphis to  
8 other cities, but if you're not comparing the geographical  
9 area we have to respond to, the population, the crime and the  
10 lack of density, you're not making a fair comparison.

11 So we have enormous challenges just by the size of the  
12 city. And you know, we're understaffed by in what I say is  
13 400-plus officers, 400 to 500 officers. So you know, very  
14 challenged in Memphis. One of the most impoverished  
15 metropolitan areas in the nation. I think we only can  
16 compare to probably New Orleans.

17 And I think as a result of all those challenges, given  
18 the amount of ZIP codes that we have where a large percentage  
19 of the population lives in poverty. The challenges in  
20 education, housing, healthcare, all are exasperated in our  
21 efforts to keep Memphis safe and combat crime and also try to  
22 keep the community safe.

23 Q. Do you know any city by comparison with a similar  
24 population and what their geographical area for patrolling  
25 is?

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1 A. Yeah. I think in conversations, there's only one city  
2 in Florida that probably comes close. And I'm trying to -- I  
3 can't remember the name right now. But I've read a number of  
4 reports on their challenges. And maybe Sarasota or some  
5 other city, but there are only a handful when you talk about  
6 the geographical size and then the amount of police officers,  
7 the volume of calls and then again the geographical area that  
8 we -- and the poverty of the individuals or ZIP codes where  
9 70 percent or more of the population lives at or below the  
10 poverty line.

11 Q. In a city like Philadelphia, do you know what the  
12 square miles that patrols for the City of Philadelphia?

13 A. Yeah, I think when you talk about Philadelphia and New  
14 York and I don't have access to Google right now, but you  
15 know, we can pull it up. I've been to Philadelphia. I know  
16 the police commissioner. Philly, I think, is much smaller.

17 Boston is one that comes to mind. Actually, I can  
18 remember. Boston is 60 square miles. Boston has a similar  
19 population. The demographics are obviously very different.  
20 The socioeconomic conditions are obviously very different.  
21 But Boston has about the same amount of people. 60 square  
22 miles. I'd love to have to police Boston.

23 I think you hear a lot of people talking now about  
24 Camden, New Jersey. I mean, Camden, I think is like six  
25 square miles, and so our city lacks density. You've heard

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1 the mayor, the COO talk about it, where Memphis grew through  
2 annexation, but the police department did not necessarily  
3 grow. The stretch on city services are enormous. And again,  
4 you know, Memphis is just a very unique city. Uniquely  
5 situated in the middle of the country and definitely has its  
6 own unique set of challenges.

7 Q. How important is the use of technology in 21st century  
8 policing and particularly here with you in Memphis?

9 A. Well, I think that's an interesting question. And  
10 definitely how it applies to the Consent Decree. So when I  
11 think about technology, I was born in 1966. So when I just  
12 look at the explosion of technology, you know, I didn't grow  
13 up with a cell phone. I bought the first cell phone when I  
14 was an adult, and we were just blown away about the  
15 technology. I think I didn't see the first one until 1990.  
16 And it was a brick. It was the size of a laptop.

17 And so when we talk about no cell phones, no Internet,  
18 no facebook, no Twitter, no Instagram, no all the other  
19 sources that we talk about, especially when we look at the  
20 aftermath of 9/11, I think facebook didn't explode until  
21 2012. And every day there's some new technology coming on  
22 board. And if we think about, you know, this tablet that I'm  
23 testifying on, my grandchildren have no idea that this did  
24 not exist, but nobody had a PC until, you know, much later  
25 on.

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1           So this is all modern technology. And I think that  
2       when you ask what the people of Memphis have demanded, we  
3       have -- the city council instituted ascensional camera  
4       program because affluent neighborhoods were buying their own  
5       kind of SkyCop cameras and putting them up. And that was  
6       obviously a concern that neighborhoods that lacked affluence  
7       could not afford these cameras.

8           Well, this program has exploded to where we have, you  
9       know, received, you know, almost \$2 million worth of camera  
10      donations from neighborhoods, and when you put a value on the  
11      number of cameras that have been implemented and put up by  
12      the ascensional camera program, in the last few years, we've  
13      put up, you know, 70 cameras every year, you know, 20 -- you  
14      know, 210 cameras, and I think we're working on installing  
15      another 70. The county commission allocated \$125,000 per  
16      county commission district to install cameras, and that's  
17      just cameras. That's not including the other technology that  
18      the neighborhoods are putting up to keep themselves safe. We  
19      know that there is a proliferation of surveillance cameras.

20           Our officers take all their reports on a smart phone.  
21      So we fully embrace technology. When they take a report on  
22      their smart phone, they have access to all the law  
23      enforcement databases that Tennessee law enforcement has  
24      access to. They can run driver's license checks. They can  
25      run warrant checks. When they take a report and once that

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1 report is pretty much submitted, it's geocoded, so we know  
2 where the crime occurred. We know what time the crime  
3 occurred or likely time, and we know what type of crime. And  
4 that's what Blue CRUSH is all about. You know, pretty much  
5 using statistical history to predict crime. And so we can  
6 prevent crime.

7 But technology is fully engrained in the Memphis  
8 Police Department. If you think about it, I have two cell  
9 phones. I have a desktop, a laptop, a iPad, and that's just  
10 to keep up with the demands of this job. So technology is an  
11 integral part of what we do, and I haven't even got into the  
12 records management system where we maintain these records.

13 So if we're doing a hundred thousand reports a year,  
14 in the last four years, that's 400,000 reports. That's not  
15 including digital evidence that's being maintained. Physical  
16 evidence that's being kept up with. We have a brand new  
17 state-of-the-art 911 call center that we unveiled. The call  
18 center is receiving information. That information is being  
19 placed in our CAD system. And we're working with fire.

20 So technology has been fully embraced, and I just  
21 don't see it going away. I just hope that we can modify the  
22 Decree so we could make sure that we can fully embrace it and  
23 make sure the Decree allows us to do and work with modern  
24 technology.

25 Q. What would you say to someone that -- chief of police



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1 that would tell you just doing paper and pencil  
2 investigations are effective today?

3 A. Yeah. So I'd tell them that I want to be hired in  
4 Mayberry, so when I leave here, I'll be looking for that town  
5 that can operate on paper and pencil. I don't think there's  
6 any modern police agency that could operate on paper and  
7 pencil. The only time our officers probably take paper is  
8 when they may be taking notes. We're even evolving our  
9 tickets to an electronic ticketing system. So they still  
10 write some paper tickets.

11 If the computer system goes down, if we have a problem  
12 because the smart phones are just a cell phone. If there's a  
13 -- the network goes down, they may have to take a paper  
14 report. But it really hampers things. So again, we know  
15 that there is paper. We print a lot of paper. We take  
16 notes, but it is not how we fight crime.

17 So if you think about being strategic, being timely  
18 and accurate, the embracing of technology across law  
19 enforcement circles has definitely allowed us to better serve  
20 the public. And better allow us to keep our community safe.

21 Q. And I want to go back to something you said. The  
22 request for SkyCops and more camera technology has been  
23 coming from the underserved communities in Memphis?

24 A. Oh, without a doubt. So if you think about just the  
25 demand for SkyCops, and I think our city council did an

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1 amazing job appropriating. We appropriate about \$400,000  
2 every single year just for the ascensional camera program.

3 But we also have a Neighborhood Watch crime prevention  
4 grant program. We have an outstanding staff that works with  
5 communities, teaches them how to apply for the grant. And I  
6 think last I checked, we've given away over \$300,000, or I  
7 think it's way more than that to neighborhoods. And here's  
8 what the neighborhoods have used the money for. We take  
9 Cooper-Young, for instance, which is one of the first that  
10 really wanted to install their own camera system.

11 Cooper-Young received somewhere around \$10,000. They  
12 installed their own camera system that they manage.

13 Other neighborhoods have installed cameras. They've  
14 bought laptop computers. They've done neighborhood  
15 beautification. They've done after-school programs. And  
16 many of them recently have taken the money from the  
17 neighborhood life crime prevention grant and invested in a  
18 SkyCop or some other camera because what I hear from the  
19 people of Memphis is that they are concerned about crime.  
20 They want to feel safe, and they are happy to have -- to  
21 partner with the Memphis Police Department to do so. And  
22 it's evident in the proliferation of the cameras and what  
23 people are asking for.

24 Q. Let's talk about body-worn cameras. What has been the  
25 reception from the police force and from the citizens with

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1 respect to the body-worn cameras?

2 A. That's a great question. I asked an officer years ago  
3 when we first started deploying the cameras, when the  
4 technology was new. Memphis Police Department at one time  
5 was the largest -- we had the largest deployment of the Axon  
6 2 Flex (sic) body-worn camera. We're still a very large  
7 deployment. I think we've deployed 2,000 cameras to our  
8 officers, to detectives, to supervisors, to our -- all of our  
9 specialized units.

10 So it was an enormous undertaking. And the last I  
11 checked, there were millions and millions of videos.  
12 Millions of hours or 500,000 hours or several -- Chief Crowe  
13 could explain all that. But there's just an enormous amount  
14 of data with the implementation of body-worn cameras.

15 And here's what the officer told me. He broke it down  
16 very simply. He said the record -- body-worn camera keeps us  
17 straight, and it keeps them straight. Because when you  
18 remind a citizen that may be a little irate or, you know,  
19 could be upset or could be, you know, venting their  
20 frustration on the person they call to show up to help them,  
21 that when you remind them that, you know, this conversation  
22 is, you know, being recorded on your body-worn camera, that  
23 they tend to calm down.

24 The public needs to know that, you know, we  
25 investigate these complaints, and if we look and, you know,

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1 we find that the officer violated policy, it's a great tool  
2 to hold the officer accountable. But more than often, the  
3 body-worn camera exonerates the officer, and when we review  
4 the body-worn camera, we show the body-worn camera to an  
5 individual that may have made an allegation of a policy  
6 violation, that often, you know, we all agree that it  
7 wasn't -- the evidence or the charge is not supported by the  
8 evidence.

9 So the body-worn cameras are great. I think they're  
10 just expensive. Each year we spend about \$2 million on the  
11 body-worn cameras. But I think it's an investment well worth  
12 its cost. Because we know that without them, you don't have  
13 that independent witness, and that's what I want to end up on  
14 body-worn cameras. Independent witness that gives us one  
15 snapshot. Not the whole picture, but it does give us a  
16 piece.

17 Q. And is it important with the body-worn cameras that  
18 they are always on because -- and not just turned on when  
19 there's an incident? Explain to the Court why it's important  
20 to see things leading up to the incident or whether that's  
21 important to see things leading up to the incident, rather  
22 than having them activated when something happens.

23 A. So I want to make sure I understand you. But let me  
24 explain this, and this may answer your question. The  
25 body-worn camera, when activated, when we first got the

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1 body-worn cameras, they have a 30-second pre-roll, meaning  
2 that when I activate my body-worn camera, the camera is  
3 always on. When you power it on, it's always on. It's just  
4 not actively recording. But the camera has a 30-second  
5 pre-roll, meaning that it will go back 30 seconds prior.

6 Well, after the -- after a couple of incidents, we  
7 expanded that time to a 60-second pre-roll so we can capture  
8 more of it. But it's not practical for a body-worn camera to  
9 be on the entire time. First of all, the battery doesn't  
10 allow that. You know, the officer works an eight-hour shift,  
11 but because we're so short staffed, my officers may work a  
12 12, or they may -- I work a 12. So my body-worn camera  
13 couldn't survive a single shift with me. But if an officer  
14 works a 12-hour shift, the body-worn camera will only last  
15 for eight hours. So it's not practical to keep the body-worn  
16 camera on, and our policy says that when an officer  
17 encounters a member of the public, the body-worn camera  
18 should be on.

19 Q. But what about the pre-roll , and kind of explain to  
20 the Court what the pre-roll is. When you turn the body cam  
21 on, it goes back in time 60 seconds; is that fair to say?

22 A. Yes. That's exactly what it means.

23 Q. And is it -- is it important information in that  
24 pre-roll 60 seconds that allows you to put incidents in  
25 context?

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1 A. It could be. So you know, when you talk about  
2 body-worn cameras, you know, I don't want to record an  
3 officer eating his lunch or using the bathroom or having an  
4 intimate conversation with the spouse or, you know, some  
5 important issue that they're discussing with their family. I  
6 mean, everything should not be recorded. You know, it's not  
7 reality TV. It's a body-worn camera. It's a tool.

8 So the body-worn camera should be used when the  
9 officer is, you know, dispensing some type of official duty.  
10 And the policy says is that when they're interacting with the  
11 public. But there are times where there could have been an  
12 emergency situation where officers responds to it that the  
13 officer has tried to activate the body-worn camera. It is a  
14 button. They miss the button. The camera has fell off.

15 And so it's not a perfect device. I think about it as  
16 a cell phone, where people will say I called you, and so I  
17 didn't get the call. It didn't come through. Well, it's not  
18 perfect technology. It's very reliable, but again, it's not  
19 perfect technology. And I think it's not practical for a  
20 body-worn camera or in-car video system to be on the entire  
21 time because we couldn't handle that much data, nor do I  
22 think it's a reasonable ask.

23 Q. Let me ask you about social media and how that is used  
24 when it comes to being -- MPD being prepared and being on  
25 alert so that they can provide public safety.

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1 A. Well, I think there is no time like the present. What  
2 we've seen in the last three weeks, where we have seen in the  
3 nation unravel on social media, we saw the horrific murder of  
4 Mr. George Floyd, and we've seen the aftermath of that. So  
5 if you think about that started from a cell phone video that  
6 was shared on social media, shared with law enforcement that  
7 ignited a spark across the entire world, where we're talking  
8 about racism and equality, police brutality, justice, use of  
9 force. It has sparked this conversation from a cell phone.

10 So you think about the social media, social media is  
11 critical. And we talk about the social media being a  
12 treasure-trove of information. I just say that it is lost  
13 treasure in the Memphis Police Department because we often --  
14 there is so much confusion of whether we can access it, where  
15 we can't access it. I've read over, you know, the Decree.  
16 And there are, I think, two orders that have been issued or  
17 requests to modify. So my officers are not certain whether  
18 they can or they cannot. I'm not certain.

19 And so when you talk about social media, I'm not  
20 certain if I can watch the reporter who's embedded with  
21 activists marching around and broadcasting it in real time.  
22 There was an article, I think I may have asked our lawyers  
23 about, that was written in the Commercial Appeal. It had all  
24 of the activists in there that they interviewed. A picture  
25 that told about them. And I said oh, my God. I don't even

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1 know if I can look at this because if I print it, if I save  
2 it, if I e-mail it, am I indexing, filing, disseminating?

3 And so there's a lot of confusion. I'm confused. And  
4 I have a team of lawyers around me. Then I know that the  
5 little poor officer in the street is confused, and they're  
6 just not sure. So I think that, you know, there's a  
7 practical application. I was reviewing a number of things,  
8 and I think that, you know, the original order is 7 pages  
9 from 1978. And everything in there is -- I don't know if we  
10 can do it.

11 And I've read a number of things, but again, social  
12 media is here to stay. When we talk about crimes,  
13 individuals will commit crimes. They will post it on  
14 Facebook Live while they're doing the crime. They will --  
15 threats. We respond to about a hundred threats every single  
16 year to schools, churches, businesses, government officials  
17 and other. And those threats happen in the middle of the  
18 night. Some of them happen before school starts, and we have  
19 to react quickly. And so most of those come in to us via  
20 some social media post that some parent has shared with us.  
21 And again, you know, I tell my folks --

22 Q. Those threats, do they rise to the level of criminal  
23 threat where y'all can arrest them? Or tell me about some of  
24 the threats that come to you all through social media from  
25 parents or other agencies and the value of getting that



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1 information or nonvalue of getting it.

2 A. I think it's critical that the parents give us  
3 information. And the kids. So let's start with the kids. I  
4 was talking to Buddy Chapman a couple of days ago about Trust  
5 Pays. So I think since the inception of Trust Pays, that  
6 they received, you know, somewhere around 1200 tips. Last  
7 year, I think it was over a hundred tips. 90 of them proved  
8 to be beneficial, where guns were recovered, drugs, stolen  
9 property, knives, and it may have prevented some violent act  
10 that occurred in schools.

11 But some of the tips didn't turn out to be anything,  
12 but they had to be investigated. So they didn't turn out to  
13 be something that resulted in a criminal charge. Of the  
14 hundred-plus threats that we received last year, I think  
15 there were only 38 arrests. This year -- and I can't  
16 remember the number because it's skewed because school has  
17 been shut down, you know, there is -- I think we only had 30  
18 arrests, probably somewhere around 80-plus complaints. But  
19 again, I don't have that in front of me. A large number of  
20 complaints that don't always result in some type of criminal  
21 charge, but I think it's very important that we are able to  
22 quickly investigate those. We share information. You know,  
23 we have to alert the schools, and sometimes the schools alert  
24 us that there is a potential threat.

25 Q. So when the schools alert you all, the schools have

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1 their own security force; is that true?

2 A. That's correct.

3 Q. And when they alert y'all to a veiled threat that  
4 doesn't rise to the criminal level, do you know how they  
5 often get that information?

6 A. Sometimes. I mean, you know, sometimes they find a  
7 note that's been written by a child. A child gives a note to  
8 a teacher, but often it's a post on social media that's  
9 shared. Thank goodness that, you know, people take threats  
10 seriously.

11 So we've spent, since 9/11, I think the slogan is, "If  
12 you see something, say something." And in the aftermath of  
13 almost every situation, school shootings, the Boston Marathon  
14 bombing, the attacks we've seen in malls, in Walmarts, there  
15 was something posted on social media that someone either  
16 failed to act or they acted on, alerted law enforcement so we  
17 can intervene.

18 Q. And a lot of these posts do not rise to the level of  
19 criminal activity that you could prosecute?

20 A. Not always. Obviously, I don't know the details of  
21 every single threat. I just kind of keep up with the big  
22 numbers. But I can tell you that we're talking about an  
23 average of a hundred every single year that our team will  
24 work with Shelby County Sheriff's Office, Shelby County  
25 Schools, the Federal Bureau of Investigation to investigate.

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1 You know, 38 arrests last year. And you know, the highest  
2 number of threats are threats to schools. And I think,  
3 threats to businesses. And we've seen that over and over  
4 again. If you think about the shooting at Walmart was a  
5 disgruntled employee that went in and end up turning into an  
6 active shooter situation right down the street in  
7 Mississippi.

8 And so I've told my team over and over again, if you  
9 get a threat, you take that threat seriously. You  
10 investigate that threat. But if it's something that we need  
11 to, you know, work on on the back end, we will. But my fear  
12 is that an officer that takes a literal interpretation of the  
13 Consent Decree may hesitate or may not be able to get  
14 information to the appropriate people, and it could result in  
15 some type of tragic incident. That is my fear. And I think  
16 I've said that from day one. My fear is strictly public  
17 safety and keeping people safe. And the officers are  
18 confused.

19 Q. You used the term Trust Pays. Can you tell us what  
20 that is?

21 A. So Trust Pays -- and FYI, I hope I don't step on  
22 Director Buddy Chapman's toes. Trust Pays was a program that  
23 was established a number of years ago. And the Trust Pays  
24 allows -- you know, it was really set up for kids. Kids,  
25 school-age children to be able to report anonymously some

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1 type of threat to the school. And so what they can do is  
2 they can alert a teacher. They can alert a responsible  
3 adult. They can call in a tip to CrimeStoppers. And  
4 actually, they can get paid.

5 So I think when I -- I'm just trying to remember.  
6 I've got a lot of stats in my head. But Trust Pays, you  
7 know, 111 tips last year. And I think that eight guns, ten  
8 Tasers, ten fake guns, 20 knives and 42 drugs were actually  
9 taken off the street via Trust Pays. And then CrimeStoppers,  
10 we know CrimeStoppers had a record number of tips. They've  
11 solved at least 22 homicides. Helped us close, you know,  
12 over 200-plus crimes.

13 So between CrimeStoppers and Trust Pays, the programs  
14 that we do in school with youth, the Youth Crime Watch in  
15 schools, where they can alert a school officer or our Shelby  
16 County Sheriff's Office so we can intervene, those programs  
17 are very important.

18 Q. Let's talk about a protest or event that threatens  
19 public safety. Did you have an opportunity to look at the  
20 Charlottesville, Virginia postmortem report?

21 A. Yeah. I read the Charlottesville report, and then I  
22 also, with the FBI NEI, I went to Charlottesville. So our  
23 current special agent in charge of the FBI, we went to the  
24 National Executive Institute together. We were very blessed  
25 that we spent an entire week in Charlottesville. During that

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1 week in Charlottesville, we heard from the current chief of  
2 police in Charlottesville, who came in right after the  
3 protest. The head of the Virginia State Police was actually  
4 one of the key leaders in the response to Charlottesville.  
5 He was there, and he definitely shared his experiences with  
6 us.

7 Another young man that I went to training with in 2006  
8 did a special study on Charlottesville, and so we were able  
9 to walk the grounds. We walked around a number of the  
10 monuments that all the activities centered around. We were  
11 on the college campus and, you know, to have almost a  
12 moment-by-moment sequence of events that led up to the  
13 tragedy that was witnessed in Charlottesville, to also being  
14 able to stand at the site where a young lady lost her life,  
15 where the vehicle ran through the crowd, to me is very moving  
16 and informative. But the value of the Charlottesville AR is  
17 critical. So when we took down our --

18 Q. When you say AR, what do you mean?

19 A. Oh, I'm sorry. It's an after actions review.

20 Q. Okay.

21 MR. MCMULLEN: At this point, Your Honor, we  
22 provided a copy of the report to the Court.

23 THE COURT: Yes.

24 MR. MCMULLEN: To the Monitor and the ACLU. May  
25 I share my screen and show --

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1 THE COURT: Right. Do you want to mark that as  
2 the next numbered exhibit?

3 MR. MCMULLEN: Absolutely, Your Honor.

4 THE COURT: Okay. We'll mark that as 18. And we  
5 have it right here. So 18 marked and received. It's the  
6 independent review of the 2017 protest events at  
7 Charlottesville, Virginia. The final report.

8 (WHEREUPON, the above-mentioned document was  
9 marked as Exhibit Number 18.)

10 MR. MCMULLEN: Yes, Your Honor. I want to go to  
11 page 30.

12 THE WITNESS: Sorry. You're going to have to  
13 take time with me because I can't read that.

14 MR. MCMULLEN: Okay. We don't intend for you to  
15 read it. And I'm going to what is Section C, the aftermath  
16 report, and you can tell us about it.

17 BY MR. MCMULLEN:

18 Q. And do you see the highlighted portion?

19 A. All right. So I think if I get too close to the  
20 screen, that's the top of my head, and I apologize. So it  
21 says "For CPD," and I think that's Charlottesville Police  
22 Department. "The events led to a reassessment of the  
23 department's approach to intelligence gathering. CPD Chief  
24 Al Thomas told us that the events of May 13th revealed an  
25 operational blind spot. Thomas noted that CPD lacked

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1 advanced capabilities for social media monitoring that may  
2 have helped the department anticipate these events. Chief  
3 Thomas moved forward with a request to purchase software  
4 capable of pinpointing potential threats, based on social  
5 media activity."

6 Q. That's it. And I want you to finish telling us about  
7 the verbal conversations you had with the command staff in  
8 Charlottesville and what you learned, but I did want to --  
9 and I do want you to talk about that part of the report, what  
10 you call the AR or the after...

11 A. After actions review.

12 Q. Yes. Go ahead.

13 A. Well, I mean, it's stated right here. We spent a lot  
14 of time talking about -- it wasn't just a need. It was an  
15 obligation of law enforcement to monitor social media. They  
16 were shocked when I told them that Memphis is under a 1978  
17 Consent Decree, and it is my contention that we cannot do  
18 that. And so they just said, man, I don't see how you guys  
19 are doing it. And I said I don't see how we're doing it  
20 either. And my fear is something will get through that we  
21 could have avoided because everything is posted on social  
22 media and shared. But unfortunately, we can't do what other  
23 law enforcement agencies all across the nation are doing.

24 So again, I think it does present an operational blind  
25 spot. You know, we spent an enormous time just talking about

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1 how Charlottesville police and others did not see things  
2 unfolding and unravelling because of a lack of understanding  
3 of how these things are organized and shared on social media.  
4 And how an event can grow from, you know, two or three people  
5 to 2,000 people in a matter of minutes and quickly overwhelm  
6 police resources. And we saw that in the bridge protest.

7 Q. I'm glad you brought that up. Explain to the Court  
8 the bridge event and how quickly the crowds swell and the  
9 strain and the need for preparation for the police department  
10 to be able to protect the crowd.

11 A. Yeah.

12 Q. Let's first start out, at a general protest, you're  
13 going to have who? The protesters and you have  
14 counterprotesters; is that fair to say?

15 A. I apologize. I just was a little distracted. Someone  
16 has posted a picture of some kind of defund the police thing.

17 THE COURT: That's simply not evidence. Don't,  
18 you know -- you know, we have a fascinating situation in the  
19 United States. We allow people to say a lot of things. And  
20 I know you're, of all people, you've been remarkable in  
21 listening to a lot of things; is that a fair question for  
22 you, Director? You've had to hear a lot of things. Some of  
23 them we might not agree with.

24 THE WITNESS: Oh, sure. Sure.

25 THE COURT: Right. But go right ahead. I think



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1 we're talking about the bridge and overwhelming, and I'm very  
2 interested in what you have to say on that. So go right  
3 ahead.

4 THE WITNESS: Yes, sir.

5 A. So my comments were that, you know, within a matter of  
6 minutes, we observed the abilities for individuals to  
7 organize on social media and a crowd to swell from a couple  
8 of hundred to 2,000 in a matter of minutes.

9 And our contention since 2016 was to only be able to  
10 make sure we could plan, we could allocate resources to keep  
11 people safe. This has been definitely a challenge, since we  
12 have been in this current situation where daily protests all  
13 over the city, not knowing the when, the where, the how, but  
14 also having the challenge of keeping our citizens safe,  
15 protecting them from the threat or trying to protect them  
16 from the threat of vehicle rammings, possible bombings or  
17 some other nefarious intent carried out by a person that may  
18 not unnecessarily believe what they believe.

19 So it's been an enormous challenge. But that's why we  
20 have a permitting process. But you know, given the current  
21 climate, we know that individuals have been allowed to  
22 express their First Amendment right without a permit, but it  
23 has not made the challenge of keeping them safe any less  
24 difficult, if not at some times almost impossible.

25 BY MR. MCMULLEN:

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1 Q. When you have counterprotesters there, can you explain  
2 to the Court the difficult situation the police department is  
3 in when you have protesters and counterprotesters?

4 A. Very much so. I can go back to the 1998 Klan rally.  
5 I participated in that rally. And therefore, we failed to  
6 keep protesters, counterprotesters and protesters separate.  
7 It ended up in chaos. Rocks being thrown. Glass bottles  
8 being thrown. Tear gas was deployed. And I vowed from that  
9 moment, that I would do everything I could do to never allow  
10 that to happen again.

11 So if you fast forward to 2013 during the KKK rally,  
12 there was talks that the city would go up in flames. We made  
13 sure we kept the counterprotesters and the protesters  
14 separated. We fully deployed, properly deployed somewhere  
15 around 400 police officers to keep that event safe. But  
16 again, we had time to plan. We probably had a 30-day or more  
17 notice of the event. And we made sure we swept and kept  
18 everything safe. If you go to the --

19 Q. How can y'all tell -- how can MPD tell how many people  
20 are going to show up so that they can plan for that or how  
21 many counterprotesters are going to show up? What do you  
22 understand, even nationally, the best way to gauge crowds so  
23 that you can be prepared and ready to keep the protesters and  
24 counterprotesters safe from any violence?

25 A. Well, in one is we ask that they pull a permit. And

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1 so the permitting process allows us to determine the safety  
2 requirements and allows us to, you know, plan adequate  
3 resources and plan for any countermeasure that is necessary.  
4 Without the permitting process, I rely heavily on the  
5 Tennessee Fusion Center. The Tennessee Fusion Center puts  
6 out daily briefs. They will also provide information on any  
7 planned protests in the state of Tennessee.

8 So we can be aware that we saw that something can  
9 happen in Nashville that could have an impact on Memphis.  
10 Something happened in Minnesota that could have an impact on  
11 Memphis. And so we just need to be aware so we can plan.  
12 But you know, sometimes people will share a social media  
13 post, and/or other law enforcement will alert us, or a  
14 citizen will call 911. And so -- but the challenge is that  
15 because we don't know, it's very difficult to plan. So we  
16 are only reacting to a call or some observation by a police  
17 officer. And often that's kind of too late to put adequate  
18 prevention measures in to keep people safe.

19 Q. When you talk to your counterparts in other  
20 jurisdictions that are not under the Consent Decree, what do  
21 they do to try to gauge participation in those protests or  
22 counterprotests?

23 A. The first thing they do is look at social media. They  
24 look at the interests of a particular host. They look at  
25 kind of to anticipate -- they look at past events, obviously.

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1 But they look at social media. They talk about it.

2 And I'll give you a great example. We know that when  
3 Confederate 901 threatened and they did, they came back to  
4 Memphis to protest the taking down of the statutes, we looked  
5 at a similar protest that occurred after Charlottesville  
6 within the state of Tennessee. I think it was in Smyrna.  
7 The TBI deployed in force, along with Metro Nashville to  
8 support that, and then the former director of TBI, Mark Gwyn,  
9 deployed 200 TBI agents to Memphis so we could make sure that  
10 we could keep that particular event safe surrounding the  
11 taking down of the Confederate monuments that you're very  
12 familiar with.

13 Q. So again, and if you can't coordinate with those  
14 agencies and share information, would it be burdensome or  
15 onerous on the police department on trying to keep people  
16 safe when you've got another agency, the TBI here with  
17 information, and if you're limited in your cooperation with  
18 them, would that create an onerous condition for MPD?

19 A. Without a doubt. I think the challenge is too great.  
20 And so you know, when listeners talk about -- I have to pay  
21 attention to things that are not only going on in the United  
22 States but across the world. Vehicle rammings. You know,  
23 we've seen that in Memphis locally. There have been a couple  
24 of situations where individuals have been arrested and  
25 charged for driving through. We haven't had a true ramming,

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1 but approaching protesters, driving through, making contact.  
2 Luckily, we've only had those handful of incidents. But I  
3 have to be concerned about that.

4 I've been concerned about that since 2016 because  
5 that's when you've seen vehicle rammings. You've seen them  
6 in New York. You've seen them in Nice, France. You've seen  
7 them in Charlottesville. You've seen them in other parts of  
8 the nation. And so I have to be concerned about that.

9 So law enforcement, being able to share if there's a  
10 potential attack of a vehicle ramming, we need to be on the  
11 alert. We just had one during the St. Jude marathon, where a  
12 young man from out of town ran through a barricade. Law  
13 enforcement stopped that young man, and if he would have ran  
14 into a crowd of those runners, we could have -- it could have  
15 resulted in a number of injuries and deaths.

16 So information like that must be shared. We take it  
17 seriously. We make preparations. During the MLK50  
18 celebration, during the annual MLK March, we make sure that  
19 we try to close every avenue of possible attack. And that we  
20 allocate appropriate staff to keep the marchers safe.

21 Q. When a dignitary comes into town, let's say a  
22 president or former president, how many different agencies  
23 would you need to coordinate with if they're coming here to  
24 Memphis?

25 A. God. I mean, I can't count them. Because what

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1 happens is that if you have a -- let's go back to the Vice  
2 President Mike Pence visiting back in January. So we would  
3 normally be alerted by the Secret Service, and they will  
4 almost activate all available federal agents to support that.  
5 So you're talking about Secret Service, ATF, the FBI, DEA,  
6 you know, there are individuals in the Department of Homeland  
7 Security. TBI will be involved. Tennessee Highway Patrol.  
8 MPD. Shelby County Sheriff's Office. Depending on the  
9 venue. Bartlett, Germantown, Collierville. I mean, you're  
10 talking about almost every available law enforcement agency.  
11 Tennessee Department of Homeland Security. Tennessee Fusion.  
12 Tennessee Department of Safety.

13 Q. Would the Secret Service sometimes, would they give  
14 y'all alerts of people who are not wanted, not criminals but  
15 that they are keeping an eye on because of that certain  
16 dignitary?

17 A. Yes.

18 Q. And do you have any way of knowing how they got that  
19 information or what they did to put that person on that list?

20 A. No.

21 Q. Can you explain to the Court how different levels of  
22 clearances allow you to know different levels of information?

23 A. Good question. So I'm a member of the Joint Terrorism  
24 Task Force. That requires a background check and a minimum  
25 of a secret clearance. So I was able to transfer my secret

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1 clearance from the United States Army over and go through  
2 another background check with the FBI to be part of the JTTF  
3 or the JTTF executive committee. There are higher levels.  
4 You know, there's -- I have a secret, but there is top  
5 secret. So the majority of the FBI agents have a top secret  
6 clearance.

7 So there's information that they're not allowed to  
8 share with me. They can share classified. They can share  
9 secret information. They can share unclassified. But they  
10 can't share top secret information. And when you talk about  
11 protecting the president or vice president, that's very, very  
12 high level. And there's some stuff that they're not going to  
13 be able to share with me or my staff.

14 Q. But they would identify to you a person that they were  
15 concerned about, but they wouldn't share with you why or how  
16 they know; is that the type of information you would get?

17 A. So I attended a Secret Service course, I think, in  
18 2018. I spent a week in Washington, D.C. working with the  
19 Secret Service. I'm very familiar with their protocols. So  
20 if you talk about protecting the vice president or president  
21 of the United States, they don't think they have to tell us  
22 their number one goal is to keep the president safe. I think  
23 when you talk about the timeliness, if there's an inbound  
24 threat to the president or vice president of the United  
25 States, our obligation is to act and keep those individuals

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1 safe.

2           So they don't have to share much of anything. But  
3 when they pretty much have us coming in to help protect  
4 because there's not enough of them to do the job they need to  
5 do to build, to protect the barrier around the president or  
6 the vice president, they elicit local law enforcement and  
7 other state law enforcement, federal law enforcement to  
8 assist.

9           So again, when things are rapidly evolving that  
10 they're uncertain, sometimes they're tense. I don't think  
11 it's practical to ask them to do that, nor is it probably  
12 safe for the president or vice president to actually ask them  
13 to do that.

14 Q.       Without naming the businesses or organizations --

15           MS. YARBROUGH: I'm sorry to interrupt, Your  
16 Honor. This is Stella Yarbrough from the ACLU. If you've  
17 noticed, Mr. Castelli has lost the hearing. I think he's  
18 having computer issues at home. Is it possible just to give  
19 us a three-minute pause to allow him to --

20           THE COURT: Sure. Sure. We can take a very  
21 brief pause. And probably a good thing to do anyway. We'll  
22 make it five because three is kind of quick. And so we'll  
23 take a break until about six till the hour. And we will go  
24 for another 20 or so minutes. And a short break also for our  
25 witnesses. Also Director, very short break. Five-minute



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1 break for everybody. We'll reconnect in five minutes. Thank  
2 you so much.

3 MS. YARBROUGH: Thank you, Your Honor.

4 (Short break.)

5 THE COURT: I think we have almost everyone. And  
6 there's our witness. So we're ready to resume testimony,  
7 Director.

8 And so counsel may proceed.

9 BY MR. MCMULLEN:

10 Q. When we left off, Director Rallings, and I don't want  
11 you to name the institutions or businesses, but there are  
12 some institutions in this city, which if they were  
13 compromised by terrorists or someone wanted to do destruction  
14 to the city, it would be dire consequences for the City  
15 overall. Can you talk about the importance of sharing  
16 intelligence with those institutions?

17 A. Well, so not only is there a full-time JTTF, there is  
18 a part-time.

19 Q. When you say JTTF?

20 A. Joint Terrorism Task Force.

21 Q. Okay.

22 A. And a number of the major corporations are part of the  
23 part-time. So there is one particular corporation  
24 headquartered in Memphis that is critical to shipping all  
25 over the world. They are providing coronavirus relief,

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1 medical equipment. And so if you talk about critical  
2 infrastructure, they are one of those companies. So you  
3 know, if we go back to 9/11 when all these planes were  
4 grounded, not only do they ship -- they ship hearts going to  
5 a heart patient. Other organs and so, you know, there's  
6 critical infrastructure that's used by the United States  
7 Government that is in private industry.

8 We know that there are a number of critical  
9 infrastructures when we talk about in rail, in air, in  
10 waterborne that just cannot stop moving. And so any threat  
11 to those infrastructures, in utilities. If we lost MLG&W.  
12 If we lost Valero, that does -- and I didn't mean to call a  
13 particular name, but --

14 Q. But in fairness --

15 A. But critical infrastructure that is vital to the City,  
16 not only supporting a local effort, but is vital and critical  
17 to supporting a national level of the ability to ship goods  
18 and services. So you know, since March, we've been talking  
19 about essential services and businesses. And other people  
20 are just recognizing those, but they've been essential  
21 throughout them becoming a business and are woven into the  
22 fabric of the United States of America.

23 MR. MCMULLEN: Your Honor, I want to lead the  
24 witness so that we cannot mistakenly reveal something that  
25 shouldn't be revealed.

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1 THE COURT: You're allowed to do so in these  
2 circumstances. That's fine.

3 MR. MCMULLEN: Thank you.

4 BY MR. MCMULLEN:

5 Q. Aren't there some institutions here that have certain  
6 things on their property that would be very destructive in  
7 the wrong hands?

8 A. I wouldn't use destructive. I would use catastrophic.

9 Q. Okay. And those institutions have their own security  
10 force, is that not true?

11 A. That's correct.

12 Q. And is it important to you to be able to coordinate  
13 and cooperate and share intelligence with those institutions?

14 A. It's absolutely critical.

15 Q. And those institutions are not necessarily law  
16 enforcement; is that correct?

17 A. That's correct.

18 Q. All right. I want to go back to --

19 MR. MCMULLEN: Thank you, Your Honor, for  
20 allowing me that latitude.

21 THE COURT: Certainly.

22 BY MR. MCMULLEN:

23 Q. I want to go back to the bridge incident. And anybody  
24 from Memphis remembers what happened on the bridge and your  
25 actions in defusing that. But I want to state, you know,

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1 that the crowd size swelled so quickly. How could you  
2 determine or gauge how big the crowd was going to be?

3 A. It was impossible. And I have to say that, you know,  
4 that not only we, but the actions of some of the protest  
5 leaders allowed us to mitigate that. But you know, the crowd  
6 swelled from, again, 200 individuals that I talked to at  
7 FedExForum. I went to WLOK to do the radio spot, and I heard  
8 the crowd growing by the minutes. 200, 400, 600. To the  
9 crowd becoming mobile.

10 And it probably wasn't until I saw, you know, we have  
11 a camera on the bridge. The bridge is critical  
12 infrastructure. That when I saw the number of bodies there  
13 and I recognized the danger, I immediately knew that I needed  
14 to put myself into the situation to try to mitigate it.

15 Q. Do you have any opinion on how the crowd grew so  
16 quickly?

17 A. Well, I watched a number --

18 MR. CASTELLI: Your Honor, I think I need to  
19 object to that. That's pretty speculative.

20 THE COURT: Exactly. The objection would be  
21 sustained on speculation. I think that the question can be  
22 rephrased to what information specifically do you have about  
23 how the crowd quickly grew larger. But we have to know the  
24 basis for it. There has to be a -- lack of foundation was  
25 part of the objection, and I have to sustain that. So with

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1 that explanation, I'm going to let counsel see if we can  
2 rephrase that question.

3 MR. CASTELLI: Thank you.

4 MR. MCMULLEN: Thank you, Your Honor.

5 BY MR. MCMULLEN:

6 Q. Based on your after action report, do you have any  
7 information on how -- what precipitate the crowd growth and  
8 the instructions on where to go and what the agenda was?

9 A. Well, and I don't want to -- I can only answer the  
10 question honestly. So individuals on the bridge, you know,  
11 were out there for a number of hours. They showed me how  
12 they were communicating. It was Facebook Live. It was  
13 social media. A number of them have done interviews where  
14 they admitted to it.

15 So there is a great PBS documentary out there. A  
16 number of media interviews where they talked about it. But  
17 individuals on the ground showed me that they were on  
18 Facebook Live. I'm not a social media person. So I  
19 definitely didn't appreciate the value of it. And that's  
20 kind of what we're talking about now. Just because I  
21 personally choose not to use a particular platform doesn't  
22 mean it does not have value.

23 So they were able to respond by one, watching the  
24 local news that was broadcasting live, but the vast  
25 majority -- the news showed up after the protesters got

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1 there. They communicated on social media through texts,  
2 through e-mail, through Twitter, through other local, you  
3 know, groups, and it's all social media. And I think that's  
4 why the value of being able to monitor for a legitimate law  
5 enforcement purpose is critical to keep people safe.

6 And I'm just happy nobody died that day. Some  
7 individuals said that it would have been worth losing  
8 somebody. I just can't agree with that. Nobody died. The  
9 bridge is extremely dangerous. And you know, that's why we  
10 tried to, you know, mitigate that and ask, you know, the  
11 state police to take their responsibility over.

12 Q. Let's talk about -- well, I want to --

13 MR. MCMULLEN: Your Honor, I want to publish  
14 Exhibit Number 8.

15 THE COURT: Certainly. Go right ahead.

16 MR. MCMULLEN: And it's situational awareness  
17 from Tennessee Fusion Center.

18 BY MR. MCMULLEN:

19 Q. Okay. Director, are you familiar with this document?

20 A. Yes.

21 Q. Okay. Is this something that -- what is it? Just  
22 tell us what it is.

23 A. It's a situational awareness bulletin dated 12 June,  
24 2020 from the Tennessee Fusion Center and the Tennessee  
25 Department of Safety & Homeland Security.

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1 Q. Okay. I'm going to give you -- all right. We're  
2 going to give you a hard copy of it. Maybe it would be  
3 easier to read for you.

4 A. Okay.

5 Q. Now, on this, could you tell the Court what  
6 information you get from this and how you react to this --  
7 how you react to this information as the police chief  
8 director, police director.

9 A. Well, so I mean, I think I get a daily set of  
10 bulletins from Tennessee Fusion. So let's just talk about  
11 the Fusion Center. I think there are 80 Fusion Centers  
12 across the nation. They were set up after 9/11 because the  
13 aftermath of 9/11 was that our intelligence agencies, our  
14 federal agencies, our state and local agents, were not  
15 talking to each other. So Department of Homeland Security  
16 makes sure that -- the federal Department of Homeland  
17 Security makes sure that these Fusion Centers operate within  
18 the guidelines of federal laws, state and local laws.

19 Q. And this was something done after 9/11?

20 A. Yes. Yes, after 9/11.

21 Q. There was a change of circumstances in the country?

22 A. Obviously. We know that -- we did not want -- and  
23 remember I'm also military and police, so I had a dual  
24 mission. And I knew the importance of keeping our nation  
25 safe and avoiding a 9/11. And obviously it's worked because

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1 we haven't had another 9/11 moment and hope that we can  
2 continue to keep the United States safe.

3           However, when I look at these, I know that it is a  
4 professional product. I've been to the Fusion Center. I've  
5 known each one of the directors of TBI. The heads of the  
6 Department of Safety & Homeland Security. And I know that  
7 they put together a good product.

8           The first thing I look at is the classification, this  
9 particular bulletin is unclassified. It's law enforcement  
10 sensitive. That means that, you know, it's just not  
11 necessarily to be published in the Commercial Appeal. It was  
12 made for law enforcement, but it's not classified. So  
13 there's parts of it that could be shared.

14           And I go back to -- when I look at this, I think about  
15 the national Day of Rage that was posted on media.  
16 Businesses started shutting down. I was getting all types of  
17 calls about what we're going to do. I said go to work.  
18 We're going to try to keep you safe. And so that's what I  
19 look at.

20           So this bulletin says a couple of things. Scope, key  
21 judgment and details. And so each one of them is situated  
22 like that. It talks about Tennessee implications. So it  
23 focuses on the state. It's a three-page bulletin. So I try  
24 to ingest this very fast because there's so many of them. I  
25 know the significance of Juneteenth. And it just talks about



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1 situation awareness.

2 Q. What is the significance of Juneteenth, just briefly?

3 A. Well, we know that, you know, many in the nation were  
4 not told about emancipation until years after emancipation.

5 So Juneteenth celebrates that date where so many others  
6 learned about it. And so Juneteenth has been a celebration  
7 in Memphis every single year. It's a significant day for  
8 African-Americans. And so you know, when you talk about  
9 these certain dates that are pivotal in the history of  
10 Americans, pivotal in the history of African-Americans, it's  
11 just a day to recognize. So --

12 Q. Now, June 19th, that will be tomorrow, and so this is  
13 a bulletin that you received on June 12th; is that right?

14 A. Yes.

15 Q. Now, tell me, is this just something that the rumor --  
16 or how do you analyze the credibility of this document?

17 A. Well, first, I depend on the Tennessee Fusion Center  
18 and the Department of Safety & Homeland Security to do their  
19 job. I mean, we've trained with them. Again, they have  
20 standards they have to follow. And I trust that they're  
21 going to put out a product.

22 But I just read the bulletin. And I think that you  
23 have to read the bulletin and know what they are saying. And  
24 normally it's in the first couple of paragraphs. So first is  
25 situation awareness. And public safety agencies across the

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1 state in order to inform the significance.

2 So if I know anything about June the 19th, Juneteenth,  
3 well, I can learn about it and the potential for civil unrest  
4 during some scheduled protests. So if I've got a protest  
5 scheduled, I may make sure that I have additional manpower.  
6 That I make sure I advise my officers of the significance of  
7 Juneteenth so they're aware of, you know, and they understand  
8 why people will respond or how they may respond.

9 Understanding previous violent incidents may provide insight  
10 for future violence and vandalism detection by state and  
11 local authorities.

12 So they also talk about, you know, First  
13 Amendment-protected activities and that TFC safeguards these  
14 rights. And only reports on First Amendment-protected  
15 activities or operational planning in the interest of  
16 ensuring the safety and security of the public. I think TFC  
17 put some of that language in there just for Memphis. They're  
18 aware that we're under a Consent Decree. And so they want to  
19 remind not only us but everybody else in the state that's our  
20 goal.

21 I go to key judgment. TFC is not aware of any  
22 credible, specific intelligence regarding calls for violent  
23 action by violent opportunists during these events. But it  
24 assesses with high confidence, and I will highlight that,  
25 that violent opportunities are likely. Violent

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1 opportunities, they're a possibility. They have high  
2 confidence that some violent individuals are going to show up  
3 and try to take advantage of these events and engage in  
4 violence, rioting and/or vandalism during peaceful protests  
5 and attempt to incite others to engage in similar activity,  
6 which is the same warning that was put out in 2016 when we  
7 saw the unrest with law enforcement. Five officers being  
8 killed in Dallas. Three killed in Baton Rouge. We just lost  
9 Sergeant Verdell Smith in Memphis.

10 And so it's almost the same scenario where there's an  
11 opportunity of violence, you need to be on the alert. You  
12 need to plan and be ready.

13 Q. Now, when I look at this, when I look at this key  
14 judgment, I see, not aware of any credible, specific  
15 intelligence. So from my perspective, I'm kind of relaxed.  
16 Nothing is really going to happen here. Now, you pointed out  
17 high confidence in the next sentence. The TFC assesses with  
18 high confidence. Is that code for something? What does that  
19 mean for somebody in the industry? Is that just one person's  
20 opinion?

21 A. No, no, no. If you look at it, it's got a C by it.  
22 And I don't know what you call that. But I then go to the  
23 bottom, and I tell people, I'm not the smartest person, I  
24 just read. And so C down here, and I'll read exactly what  
25 that says. So I don't have --

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1 Q. It's kind of small.

2 A. It's very small. If you miss it, you'll miss a lot.

3 "High confidence generally indicates the TFC's judgments, the  
4 Tennessee Fusion Center, are based on high quality  
5 information, from multiple sources. High confidence in a  
6 judgment does not imply the assessment is a fact or a  
7 certainty; such judgments might be wrong. While additional  
8 reporting and information sources may change analytical  
9 judgments, such changes are most likely not to be refinements  
10 and not substantial in nature."

11 And so let me just tell people what that means, and  
12 I'll give you a great example. The day of the bridge  
13 protest, I was at WLOK listening to the radio. Before I went  
14 to the radio station, there was just a lot of people  
15 downtown. And before that bridge protest exploded, I called  
16 my deputy director, and I said, I don't know what's going on,  
17 but I need you to put on your uniform, and I need you to come  
18 downtown. He said, what is going on? I said I don't know,  
19 but I just feel something is about to happen.

20 And so a trained, skilled law enforcement officer pays  
21 attention to what's going on. Sometimes you can feel the  
22 tension in the air. You just feel like something's just not  
23 right. So he went in to put on his uniform and come downtown  
24 just to say hi to me. Great. But thank God he was here  
25 because every step I took off the bridge, he took. Every

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1 decision I made, he was involved in. And it was just a  
2 hunch. That was just a feeling of uneasiness, recognizing  
3 that something's not normal. That we need to probably be  
4 aware.

5 And so some people asked me, well, how do you know. I  
6 said I don't know, man, the hair will stand up on the back of  
7 my head. And 90 percent of the time, I am in the ballpark.  
8 So I think it's from experience. It's from ingesting a large  
9 amount of information that comes from Fusion. You know,  
10 Charlottesville AARs. Studying this for a 30-year career in  
11 military and law enforcement. And I just consider myself a  
12 subject matter expert. And then I trust my instincts because  
13 I'm a lifelong Memphian.

14 And so some stuff that Tennessee -- that's going to be  
15 in these bulletins could be information from a confidential  
16 source that they can't tell me about. It could be top secret  
17 information that they can't tell me about. But their job is  
18 to put together a high quality product that I can use as a  
19 reference and make plans so that I can provide protection for  
20 the citizens of Memphis and our law enforcement officers.

21 Q. Would it be fair to say you're not necessarily --  
22 there's no way for you to tell how they acquired the  
23 information, unless you ask, like spent time trying to track  
24 it down directly, you might run into a brick wall on that?

25 A. Yeah. There's no way. I think there's a couple of --

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1 sometimes there's a reference on page 2. There's a May 2018  
2 where a Revolutionary Abolitionist Movement (RAM) released a  
3 video promoting a Capture the Flag campaign. So often these  
4 bulletins will, you know, connect to something that's  
5 happened or something that's been posted. They look at, you  
6 know, current events. And you know, then they list some  
7 celebrations. And again, you know, it keeps us aware.

8 Q. Do you know whether the Tennessee Fusion Center has  
9 social media? Do they search social media? Do you know  
10 whether they do?

11 A. So the Tennessee Fusion Center is unique. There's  
12 only one in the state. The Tennessee Fusion Center. And if  
13 you look at the bulletin, they're kind of code commanded, so  
14 to speak. So part of the Tennessee Fusion Center is TBI.  
15 And I think the TBI focuses on a lot of the criminal. But  
16 the Department of Safety & Homeland Security, they are, you  
17 know, pushing out the things that when you talk about  
18 terrorism.

19 Q. Threat assessment?

20 A. Threat assessments, you know. They pushed out a lot  
21 on COVID. And then TBI will focus on fraud, fugitives,  
22 BOLOs, safety.

23 Q. What is a BOLO?

24 A. Be on the lookout. So if we know that someone  
25 committed a heinous act in another jurisdiction or made

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1 threats to harm law enforcement or there's something we need  
2 to be aware of, they'll put out a BOLO so we are aware of a  
3 potential threat. It could be a new drug, a new -- Fentanyl  
4 that is very hazardous to law enforcement.

5 And so they just put out a large number of products in  
6 -- these situation awareness bulletins are only one of a  
7 whole laundry list. But you can go to their website and pull  
8 it up. They'll tell you what they're about. They'll tell  
9 you what they do, and they really do a great job to me of  
10 telling their own story.

11 THE COURT: All right. We did indicate that we  
12 would stop at 15 after. We've gone another four or five  
13 minutes. But we need to be mindful of the schedule. And so  
14 it's better to take that lunch break now for those who wish  
15 to do that.

16 We can come back at 1:00. We cut a little bit of  
17 time off our break, but it's important. And staff also has  
18 to have a break. You know we have a court reporter. We have  
19 other staff. We can't go indefinitely without a break.

20 So we'll be excused until 1 o'clock, at which  
21 time we'll resume. Of course, Director, always good to have  
22 you, and we'll ask you to be ready to go at 1:00. And of  
23 course, Mr. McMullen, you'll resume your examination at that  
24 time. So we're going to let everybody be excused. And we  
25 are in recess until 1 o'clock. And so thank you all very

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1 much. Thank you.

2 (Short break.)

3 THE COURT: All right. This is Judge McCalla,  
4 and hopefully we have everyone. It looks like we don't. All  
5 right. Well, maybe we are ready. Let's make sure.

6 Mr. McMullen, can you hear us all right?

7 MR. MCMULLEN: Yes. We can hear you clearly,  
8 Your Honor.

9 THE COURT: All right. Well, we've been -- I  
10 think we are set then. I'm looking for the most important  
11 person, which is the Director. There he is, Director. We're  
12 all set to go.

13 THE WITNESS: Hey, Judge.

14 THE COURT: Yeah. You keep moving around on my  
15 screen. I'm glad to you have, absolutely.

16 Counsel?

17 MR. MCMULLEN: Your Honor, if I can get an  
18 agreement from the other party --

19 (Music interruption.)

20 THE COURT: Okay. Now mute it out.

21 Okay. The individual who is attempting to  
22 interrupt these proceedings will now be excluded from the  
23 meeting. You're allowed to attend as long as you behave in  
24 an appropriate way in a courtroom, which does not of course,  
25 allow individuals to engage in personal vocalization, unless



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1 they're called upon by the Court. So if we can, that  
2 individual will be removed. Unfortunately, because this is  
3 an opportunity for every person. It's an open proceeding,  
4 but of course, it has all the dignity of any court  
5 proceeding, and people are expected to behave in an  
6 appropriate way. Staff will tell me when they're ready to  
7 go.

8 All right. We're going to try this again. All  
9 right.

10 Mr. McMullen, can you hear me now?

11 He can hear but we cannot hear Mr. McMullen.

12 MR. MCMULLEN: Your Honor, can you hear me?

13 THE COURT: Yes, I can. I think you're the only  
14 one in the whole group that can speak now. We're going to  
15 have to unmute the Director.

16 Director, I bet you wish you had -- Director  
17 probably wishes he had this kind of control all the time,  
18 right, Director?

19 THE WITNESS: Your Honor, can you hear me?

20 THE COURT: Absolutely. We're gradually bringing  
21 people back on line.

22 THE WITNESS: Yes, sir.

23 MR. MCMULLEN: Okay. Your Honor, preliminarily,  
24 we have two other witnesses that can only go today. And I  
25 was hoping I could get agreement with Mr. Castelli and

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1 Mr. Stanton that I got a few more questions to finish up with  
2 Director Rallings, and he can come back tomorrow for cross  
3 examination and allow us to go on with the other two  
4 witnesses that have to be done today.

5 THE COURT: Sure. I understand. Let me ask  
6 Mr. Castelli, and I hope we've got it where we can hear you,  
7 Mr. Castelli.

8 MR. CASTELLI: Can you hear me, Your Honor?

9 THE COURT: Yes, I can.

10 MR. CASTELLI: Okay. Great. No. I don't have a  
11 problem with taking some witnesses out of order and  
12 accommodating peoples' schedules.

13 THE COURT: Absolutely.

14 Mr. Stanton, any issue about that? Glad to do  
15 it.

16 MR. STANTON: No objection, Your Honor.

17 THE COURT: Absolutely. Well, we'll certainly be  
18 glad to do that. And Director, I know that we will be  
19 starting tomorrow, assuming that we don't get back to you  
20 today. We'll be starting no later than 9 o'clock, and you  
21 know that means, as you know, if you're not early, you're not  
22 on time. You tell them that all the time. And so we're  
23 going to follow the rule that we all are trying to follow.

24 Okay. Mr. McMullen, I think we're ready to  
25 proceed.

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1 BY MR. MCMULLEN:

2 Q. Director Rallings, we were talking about the Fusion  
3 Center bulletin. And I want to ask you, those are not the  
4 only bulletins you receive from law enforcement agencies, are  
5 they?

6 A. No, sir.

7 Q. Okay. Now, do you know whether the Fusion Center use  
8 social media monitoring in developing the bulletin  
9 information?

10 A. Yeah. I'm pretty confident that they do.

11 Q. Okay. But is it any way -- you mentioned before some  
12 level of secrecy, top secret or just secret clearance. Can  
13 you just pick up the phone and call the Fusion Center and ask  
14 them how specifically they got the information?

15 A. So I think that's probably unreasonable, given the  
16 nature, the volume of bulletins. They put out a daily kind  
17 of briefing. I've seen one briefing that had eight, maybe  
18 ten bulletins. And you know, given the nature that they're  
19 pushing out so much product right now, I don't think that's  
20 reasonable, and I mean, to be able to call the Fusion Center,  
21 track down the analyst, expect them to call whoever pushed  
22 the product out because you're getting bulletins from the  
23 FBI, department of Homeland Security, the Department of  
24 Defense, United States Army. I mean, there are -- and all  
25 the other 80 Fusion Centers can submit product.

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1           So I think that that is a standard that is rather  
2 unreasonable. I know personally I couldn't do it, given the  
3 challenge of performing all my duties.

4 Q.       Now, I want to move along to another area. There was  
5 a phrase that came up that I wasn't really familiar with the  
6 definition of. Officer-created jeopardy. What does that  
7 mean?

8 A.       So that's a good question. I used to talk quite --  
9 talk about this quite a bit when I was an instructor at the  
10 academy. And so here's what I think officer-created jeopardy  
11 is. And I don't want to talk too eye level, but let me just  
12 give you a scenario, and then I'll talk about it.

13         Normally I think about it is when an officer may rush  
14 into a scenario and place themselves in jeopardy. For  
15 instance, an officer is trying to stop an individual that may  
16 be fleeing, and the officer may place themselves in front of  
17 a vehicle. Well, we know that if the vehicle does not stop,  
18 that the officer has the decision. The officer either has to  
19 move and jump out of the way, or they can stand their ground,  
20 and it's probably going to result in some type of use of  
21 force or a use of deadly force.

22         So the courts and trainers and, you know, others that  
23 were in these scenarios may look and say that that was  
24 officer-created jeopardy. The officer did not have to step  
25 in front of the car. Well, the Supreme Court has also said

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1 that an officer has no constitutional obligation to retreat,  
2 meaning that if a officer has a reason to be there, they're  
3 acting lawfully, they do have opportunity.

4 If I go back to the scenario with St. Jude, where a  
5 individual rammed a barricade and officers jumped in front of  
6 and were running alongside of the vehicle to stop that  
7 individual. If they had not placed themselves in jeopardy,  
8 God forbid what could have happened. So it's almost a  
9 catch-22.

10 I know that California recently passed a higher level  
11 of when an officer can use a deadly force than what the  
12 Supreme Court pretty much ruled in Graham versus Conner with  
13 the reasonableness clause. So California law is probably  
14 where a lot of these new conversations have come from.

15 But another scenario could be in an active shooter  
16 situation. Where a sole officer assigned to a school. The  
17 officer is outside of the school. The officer hears the  
18 report of gunfire. That officer has been trained to wait for  
19 backup before they enter because if you enter alone, that  
20 officer could easily be shot and killed. But the officer has  
21 to make an individual decision. Is a risk to my own personal  
22 safety not as important as a risk to me possibly saving the  
23 lives of innocent children or school faculty?

24 So some will criticize the decision of the officer and  
25 say that the officer placed themselves in jeopardy by

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1 entering. But some others will criticize the officer and say  
2 that that's your job. The officer should have placed  
3 themselves in jeopardy. And there could be a tragic outcome  
4 on the other.

5 So you can't define it very narrowly. It really  
6 should be defined and reviewed on a case-by-case basis, given  
7 the totality of the circumstances. But I think for the last  
8 -- since Graham versus Conner, most of the decisions of a  
9 police officer were pretty much applied to seconds before an  
10 officer made the decision to use deadly force, where this new  
11 law kind of looks at all the things that led up to the  
12 officer making the decision, and it could be used against the  
13 police officer or could be used for a police officer.

14 I think it's a slippery slope when you, you know, just  
15 define it narrowly because it has very broad implications.

16 MR. MCMULLEN: Let me -- Your Honor, I want to  
17 enter another exhibit. It was previously submitted as a  
18 document, Defense Exhibit 1, and it is a copy of the original  
19 Consent Decree.

20 THE COURT: Certainly, that's fine. Now, the  
21 Consent Decree, the Consent Decree is part of the record, but  
22 we'll mark it here. That's perfectly fine. And that's 19.  
23 And that is the Kendrick Decree from 1978.

24 (WHEREUPON, the above-mentioned document was  
25 marked as Exhibit Number 19.)

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1 MR. MCMULLEN: Okay. I'd like to share my screen  
2 with the Court.

3 THE COURT: Certainly.

4 BY MR. MCMULLEN:

5 Q. Director Rallings, you have a copy of that Consent  
6 Decree?

7 A. Yes, I do.

8 Q. And for ease on your eyes, I gave you a copy. You can  
9 look at it. You don't have to read it from the screen. Have  
10 you read this Consent Decree before?

11 A. Yes.

12 Q. Okay. Tell me your problems with the Consent Decree  
13 as far as confusion and understanding. And I also want --  
14 you can point out certain parts, if you would like, but also  
15 tell how it impacts your officers in some of that  
16 involvement.

17 A. Okay. Well, let me first read it. And I think it  
18 would help out. So we know that the Consent Decree was --  
19 this was stamp filed 1976. And so I think that the Consent  
20 Decree is extremely challenged.

21 THE COURT: All right. It was actually 1978.  
22 And that's the file stamp on it. I just think we ought to  
23 probably be accurate on the date. Nothing wrong with that.  
24 This is not a chance to say whether you like the Decree or  
25 not. It's a chance to talk about evidentiary matters.

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1           We might want to refocus that question, provide a  
2   little more guidance to the Director because we don't usually  
3   ask for narratives, so the rule against narratives is what  
4   we're going to follow. And that means we have to have a  
5   question and answer format.

6           Mr. McMullen, let's first follow the normal rule  
7   here. Probably helpful to, frankly, everybody.

8           MR. MCMULLEN: Okay. Thank you, Your Honor.

9   BY MR. MCMULLEN:

10   Q.       Chief Rallings, you understand what the Court was  
11   saying. This was actually filed in 1978. Do you see the --

12   A.       Yeah. I just misread it.

13   Q.       I want to point you to the second page and under  
14   Definition Number 4. Political intelligence. Could you  
15   explain how the phraseology of that has impacted your police  
16   officers or how y'all have dealt with that?

17   A.       Yes. So the term "political intelligence," as it's  
18   defined in the Consent Decree, you know, is still confusing.  
19   It says, "means the gathering, indexing, filing, maintenance,  
20   storage or dissemination of information," and then it has an  
21   "or." "Or any other investigative activity, relating to a  
22   person's beliefs, opinions, associations or other exercise of  
23   First Amendment rights."

24   Q.       Tell me some of the struggles that your officers have  
25   had with the definition and the actual phrase "political



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1 intelligence."

2 A. I'll give you one in that in one of the complaints  
3 where there was a political rally that we were asked to  
4 provide security for. And one of the supervisors made a bad  
5 call and saw the political signs come out. And according to  
6 him, when he saw that, he thought that that was something  
7 we're not supposed to be involved in. We're not supposed to  
8 participate. He pulled the police officers off. And you  
9 know, to our disappointment, we were not able to do an  
10 adequate job to keep the public safe.

11 But again, it was an honest mistake. He didn't quite  
12 understand, you know. Political activity gets you wrapped up  
13 into the political intelligence. And so many of our officers  
14 are confused about it.

15 So again, I'll share what some of the officers tell me  
16 in that, you know, Director, when we go on, even if it's a  
17 criminal matter we have to go on social media, people are  
18 expressing their beliefs and opinions and their associations  
19 shown on their social media pages. They're expressing their  
20 First Amendment right, even if they're talking about, you  
21 know, shooting or having guns and having access to guns or,  
22 you know, whatever they say could be deemed as a threat, but  
23 sometimes it doesn't meet the criminal threshold. So a lot  
24 of officers are confused.

25 I mean, sometimes I may say something to my guys and

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1 say, oh, you can do that, and they'll say no, we can't. I'll  
2 say well, we need to talk to the lawyers. And it takes a  
3 team of lawyers and us discussing it and working with our  
4 legal advisor to make a determination if it would or would  
5 not be a violation of the Consent Decree.

6 So you know, I've read a hundred pages. The Decree is  
7 seven pages. I think the order was 39 pages, another  
8 49 pages, 12 pages on something. So I'm confused. So I know  
9 if I'm confused and I've been dealing with this since the  
10 litigation was filed, that many of my officers are confused.  
11 Because I have to have a whole team of lawyers to kind of  
12 keep me and make sure I make decisions and I approve  
13 investigations that are in compliance with the Decree.

14 Q. Let's look at some other places in the Decree. Well,  
15 are you clear what Decree means when -- under political  
16 intelligence, it says, "relating to any person's belief,  
17 opinion, associations or other exercise of First Amendment  
18 rights?"

19 A. No. I wish I was.

20 Q. What's the ambiguity to you?

21 A. Well, so I think I gave an example earlier where I was  
22 reading a very well-written article in the Commercial Appeal  
23 that was talking about some of our local activists. It had  
24 pictures and descriptions and, you know, what they promoted.  
25 So they were expressing their First Amendment right in this

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1 particular document. And when I read it, I thought about it,  
2 and I hit print.

3 Then I said oh, my God. And I took it and I shredded  
4 it because I wasn't sure if -- I mean, there was more  
5 information than any document I've ever seen. That was just  
6 an interview. But -- and I was, you know, thought about  
7 sending it to my staff and said, you know, wow, this is an  
8 interesting article. But I said, wait a minute, I can't do  
9 that. So not only did I shred it, I just, you know, got off  
10 of it and deleted it.

11 And then while watching some of the live feeds where,  
12 you know, reporters are step by step, there were individuals  
13 in the crowd saying that they were going to disrupt. They're  
14 going to the bridge, they're going to do this. They told us  
15 step by step. But I said, man, I don't know if I can watch  
16 this. I don't want to be found in violation of the Decree.

17 But as a citizen, am I allowed to do something that a  
18 citizen can do? And I'm still confused about that. Just  
19 because I'm a police officer. Individuals wanted me to come  
20 participate in the protest. I said well, I can't do that.  
21 Because some are going to say that I'm surveilling them, that  
22 I'm infringing upon their rights because I represent the  
23 entire Memphis Police Department. So it's not because I have  
24 not wanted to participate. I'm fearful that I will violate  
25 the Consent Decree in some type of way.

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1           So again, you know, if I'm confused, then I know that  
2           there are other officers that are confused. And I think  
3           that -- I know that some officers have said that if there's  
4           anything that's got to do with social media, I'm just not  
5           going to go look. But there are other officers that have  
6           continued, and I think we've delivered our search terms as  
7           required by the Monitor. But there is a lot of confusion  
8           regarding this Decree.

9           Q.       Okay. Let's talk about -- I want to go to Section I,  
10          restriction on joint operations. Now, just what is your  
11          understanding of what is prohibited by the Decree under  
12          Section I or allowed by the Decree?

13          A.       Okay. So there are two things. One, is I look at the  
14          Decree as filed in 1978. Then I have to go back and review,  
15          you know, Judge McCalla's opinion and order that came  
16          out 10 of 2018. I have to go back and look at the order  
17          denying immediate modification that came out in November of  
18          2019 and then the proposed modification. So you know, that's  
19          a hundred pages of documents right there.

20                 But if I look at the order as it is written, to me,  
21          it's very clear. Because again, we didn't think we were  
22          violating the order. But when I go back and read it, I  
23          looked at, you know, the Judge's order. You know, it clearly  
24          says that we were. It says, "The Defendants and the City of  
25          Memphis shall not." "Shall not" is a powerful word.

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1 "Cooperate with, delegate, employ or contract with or act on  
2 the behest of any local, state, federal or private agency or  
3 any person to plan or conduct an investigation, activity or  
4 conduct, prohibit -- or conduct prohibited by this Decree."  
5 Because political intelligence, the definition is fuzzy, that  
6 makes this fuzzy.

7         So if a citizen sends me a text message, I think there  
8 was some -- some of our friends shared my cell number on  
9 social media. And some great citizens called in, giving us  
10 valuable information regarding an allegation of a criminal  
11 act. I wasn't certain what all I could receive. Could I  
12 receive the social media posts of an incident that where the  
13 report as being criminal, but I didn't know that. Could I  
14 receive fliers of a particular event?

15         And each time I would confer with our lawyers and make  
16 sure that I was not violating the Decree because outside of  
17 the Monitor and the Court, who grants me an approval  
18 process? So the process allows me to approve these  
19 investigations. So do I approve my own investigation, or do  
20 I work with the Monitor? So again, there's still a lot of  
21 confusion there.

22         And the examples of the vehicle incidents that  
23 happened in the Cooper-Young area are great examples. They  
24 are unfolding in real time. Activists are calling me.  
25 Citizens are calling me. They're asking to send me evidence

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1 or send me information to help with the investigation. But  
2 there's just a lot of uncertainty about it, and I would like  
3 to clear the ambiguity up.

4 So I know I want, in my last ten months, I don't want  
5 to put us back into any additional litigation. I want to,  
6 you know, move on so we can make sure we're in compliance.  
7 But again, these are just uncertain times, given the volume  
8 of information that's put out on social media during  
9 political rallies where individuals are expressing their  
10 First Amendment rights. So just again, just a lot of  
11 uncertainty on my part. I'm sure -- and I'm certain because  
12 they told me. I'm certain on the part of my team and our  
13 officers.

14 Q. Director Rallings, I want to focus your attention on  
15 Section G3. Well, Section G -- let's start with just G.  
16 Okay. Under this section, I think you referred to it before.  
17 You have to give direct approval for certain searches.

18 A. Yes.

19 Q. Yes. Is that what you were referring to? All right.  
20 Tell us why that's impractical for you to have to give  
21 approval for every -- for searches under Section G.

22 A. Well, so let's go back to joint operations because we  
23 have officers assigned to a number of federal task forces.  
24 And we just received a \$9 million grant from the Department  
25 of Justice for Operation Relentless Pursuit, which is a

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1 federal task force. Those officers are working with federal  
2 law enforcement. Some of them have higher levels of  
3 clearance than I have.

4 So there's no way for me to approve information that  
5 I'm not cleared to be privy to. So I'm not sure if I need to  
6 pull them out of those task forces because of just the  
7 classification issue. But if we talk about G, where I think  
8 I have approved probably 16 investigations, a majority of  
9 those have been here in the last three weeks. That a lot of  
10 officers, if they don't quite understand this, they may not  
11 know when they need to ask for permission.

12 So when I look at any police officer, any, that means  
13 all of them, conducting or supervising a lawful investigation  
14 of criminal conduct, which investigation may result, the  
15 "may" is a problem. Because if they look on someone's social  
16 media, they may see something that is an exercise of First  
17 Amendment rights. Or so we've got a "may" and we have an  
18 "or." Or interfere in any way with the exercise of such  
19 First Amendment rights.

20 If a citizen was alerted that a police officer was  
21 looking at their social media page, it's probably going to  
22 result in a complaint to the courts. I think that that's how  
23 we got to the Court from one of those initial complaints.  
24 "Must, must immediately bring such investigation to the  
25 attention of the Memphis director of police for review and

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1 authorization."

2 Well, for the week that I was in Ghana, I had spotty  
3 cell phone coverage. I didn't have e-mail. So there's no  
4 way they could have gotten in touch with me in the ten-hour  
5 flight to and fro. You know, I did a self-quarantine for  
6 14 days. I was unavailable to sign, unless I did it  
7 electronically.

8 Q. If we read this as broadly as you've outlined -- first  
9 of all, how many criminal investigations do you all have a  
10 year?

11 A. There was 118,000 incident reports filed. We average  
12 108,000 every single year. So there's an unbelievably large  
13 amount of criminal or incident reports filed that could  
14 involve some type of crime. Now, some of those reports are  
15 memos, and they may not raise or rise to the criminal level,  
16 but they still have to be reviewed. They have to be saved.  
17 They have to be maintained. And they have to be available  
18 for investigation.

19 Q. If we said it may -- if I read this, it may result in  
20 the collection of information about First Amendment rights,  
21 and you said 118,000 criminal investigations?

22 A. 118,000 incident reports.

23 Q. Incident reports.

24 A. That's not including the 36,000 crash reports that are  
25 filed that also have individuals' personal identifiable



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1 information in those.

2 Q. So a broad reading of this because it views some  
3 potentially ten percent of them may result in collection of  
4 information about the exercise of First Amendment rights. Is  
5 it even practical for you to sign off on that many  
6 authorizations?

7 A. I don't think so. Not -- and I have thought about  
8 this quite a bit. And again, I just don't think it's  
9 practical.

10 THE COURT: I don't want to cut us off on this  
11 point. But no one reading any of these materials would, in  
12 any logical analysis, think that 118,000 matters required a  
13 signoff. That is not a possibility. And it is what they  
14 call a straw man. You're putting up something that --

15 MR. MCMULLEN: Your Honor --

16 THE COURT: Mr. Castelli, I'm going to ask  
17 Mr. Castelli.

18 Are you saying that, Mr. Castelli? You have to  
19 unmute.

20 MR. CASTELLI: Your Honor, no.

21 THE COURT: Well, let's find out. Let's narrow  
22 the issues here. Mr. Castelli, what's your position in that  
23 regard?

24 MR. CASTELLI: Well, I mean, our position is that  
25 those particular investigations that where there is a danger

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1 of collecting First Amendment or political intelligence or  
2 information about the exercise of First Amendment rights,  
3 those are the ones that require approval, not the hundreds of  
4 thousands of criminal investigations that I'm sure are going  
5 on a year. So there are definitions in here about what is  
6 political intelligence, what is First Amendment rights.  
7 Officers are trained on that. And that would narrow the  
8 scope down to those, only those investigations that involve  
9 that type of information.

10 And I was unable to object earlier, but I will  
11 launch the objection for the record. I think the premise to  
12 that question I would object to because I think there was an  
13 assumption of ten percent, and I don't know if that's  
14 accurate or not because I don't think we've had any evidence  
15 in the record about that.

16 THE COURT: All right. I just don't want us to  
17 be going on --

18 MR. MCMULLEN: I understand.

19 THE COURT: -- a rabbit trail. It would probably  
20 be better to focus -- I don't think anybody disagrees that  
21 there can be some improvements made. I think that's also  
22 true. And so let us go back and rephrase that. And  
23 Director, as I understand it, you have followed the procedure  
24 and have authorized some investigations. But we may need to  
25 modernize that approval process; is that correct or

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1 incorrect?

2 THE WITNESS: Yes, Your Honor. I've approved, I  
3 think, approximately 16 authorizations since 2018.

4 THE COURT: Sure. I mean, I --

5 THE WITNESS: 2019.

6 THE COURT: I just don't want us to be distracted  
7 from the focus of the hearing, which is the motion that there  
8 be modification. But I do understand the concern. And I  
9 certainly -- we're all listening. So let's go back, and I'm  
10 going to let Mr. McMullen sort of refocus that a little bit  
11 so it's more narrowly focused.

12 MR. MCMULLEN: I appreciate that, Your Honor.  
13 And I was not trying to set up a straw man with the premise  
14 of the question. I think I said if it was read broadly, and  
15 I think it can be read narrowly also. But I understand what  
16 the Court has said.

17 THE COURT: Sure. Sure.

18 BY MR. MCMULLEN:

19 Q. Now, you have so far signed 16 authorizations, but  
20 let's talk about it. You talked about it before, why you  
21 feel there's only been 16 authorizations.

22 A. Yes, sir. So in talking to our team, there's still a  
23 -- even with the great training that our legal advisor has  
24 been providing, even with posting the Consent Decree on our  
25 kiosk so all of our members can have access to it, even with

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1 all the media coverage that I'm sure that some of our  
2 officers are probably watching the proceedings, there's still  
3 confusion on when it's required.

4 As I stated, some officers have just refused to do it.  
5 Because you know, we're asking an officer to use their social  
6 media account to do, you know, their work or their job. And  
7 I don't think there's any wiggle room in there outside of,  
8 you know, probably Internet Crimes Against Children, human  
9 trafficking. Some of the economic crimes that would allow  
10 the officer to have another account. And so it puts the  
11 officer in a very difficult situation.

12 So because they understand the difficulty -- and I'm  
13 not saying it's impossible, I'm saying it's extremely  
14 difficult. If someone shows me their social media page, it  
15 starts out with all types of stuff about them. Where they're  
16 from. Where they went to school. Sometimes what they  
17 believe in. You know, if you -- if I have a social media  
18 page, it obviously will talk about the Army and being a  
19 police officer and maybe some of my own personal views. It's  
20 almost impossible to miss that.

21 And I think that there's still a lot of ambiguity.  
22 And I agree with the Court, and I agree with the Monitor and  
23 the ACLU in saying that there is room for modification. I  
24 think that's what we're asking for. Let's clear up some of  
25 this language so it's not confusing.

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1 I had a veteran supervisor that was at a event that  
2 was approved that was a pertinent event. So when he saw the  
3 political signs come out, he was confused, and he pulled the  
4 officers off, thus not serving the individuals that were  
5 there. So you know, at the end of the day, I'm just a  
6 practical person. We have a large volume of policy and  
7 procedures that I expect the officer to be familiar with and  
8 know where to reference material.

9 There's a large volume of T.C.A., Tennessee Code  
10 Annotated. So they need to know the ordinances of the City  
11 of Memphis. State law. Federal law. And the policies of  
12 the Memphis Police Department. And make sure they understand  
13 the Decree that still, in my humble opinion, is outdated and  
14 is very difficult to apply to modern technology.

15 That is part of the difficulty because we're trying to  
16 apply something that was written prior to. When they talk  
17 about wire intercepts and wiretaps, that's where the FBI was  
18 going in and some law enforcement were drilling holes in  
19 walls, placing wiretaps in phones, recording people with tape  
20 recorders. That has nothing to do with somebody posting a  
21 video on Facebook Live. And I think it's just, you know,  
22 with the Internet, with social media, cell phones, I just  
23 think that there's a lot of room for improvement.

24 And it is my wish as the director of the police  
25 department that we fully comply to the Consent Decree.

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1 However, I've still got to make sure that a officer with, you  
2 know, one year on the job who's in the squad car that is  
3 being presented with information, that they understand when  
4 they need to ask for authorization on an investigation. When  
5 they need to push pause and ask for a supervisor or when they  
6 just need to absolutely leave because it is something that  
7 could infringe upon the rights of individuals or shield  
8 their expression of a First Amendment right. And there is  
9 confusion.

10 Q. Let me ask you. Under Section G, investigations and  
11 stuff are 24/7 police investigations. Do you think you would  
12 benefit from the ability to designate people in your command  
13 staff --

14 A. Without a doubt.

15 Q. -- to execute those authorizations?

16 A. Without a doubt. I've had a large number of officers  
17 that have been under quarantine and a large amount of  
18 officers that have tested positive for COVID. And you know,  
19 God forbid I get it, but I could be totally unavailable to  
20 respond to these things. And someone else should be  
21 designated to approve these.

22 The deputy director of the Memphis Police Department  
23 is my number two person. He has all the authority that I  
24 have. And in my absence, he has the ability to make calls,  
25 that if I'm not available, my cell phone don't work or if I'm

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1 in a airplane a thousand miles away, someone else has to be  
2 able to make those decisions. Even the president of the  
3 United States has a vice president. There is a chain of  
4 command. And I think it's only reasonable to ask that that  
5 modification be made.

6 Q. Okay. And I know we're kind of on a time crunch, but  
7 have you had a chance to read the proposed modified Consent  
8 Decree?

9 A. Yes, I have.

10 Q. And I think there are some proposals, except for  
11 Section I, which there wasn't agreement. There was not an  
12 agreement on between the City and the ACLU.

13 A. Yes.

14 Q. I want to ask you about if you go to the second page.

15 A. Are we on the modification?

16 Q. Yes.

17 MR. MCMULLEN: Your Honor, I'd like to publish on  
18 my screen Exhibit 6.

19 THE COURT: That's fine. You can post 6.

20 MR. MCMULLEN: Proposed modified order.

21 THE COURT: There's been an Exhibit 17, and then  
22 there's Exhibit 6. Let's see if they're the same.  
23 Exhibit 6? Sure.

24 BY MR. MCMULLEN:

25 Q. Director Rallings, I want you to first read the

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1 proposed definitions of legitimate law enforcement purpose.

2 A. All right. So that would be Item 3?

3 Q. Yes.

4 A. Under definitions?

5 Q. Yes.

6 A. And it says, "Legitimate law enforcement purpose means

7 an activity conducted for the purpose of furthering the

8 prevention of crime and/or ensuring the safety of the public

9 and law enforcement personnel, while adhering to law and

10 agency policy designed to protect the privacy, free speech,

11 association, and other civil rights and civil liberties of

12 all people."

13 Q. Do you agree with that definition of legitimate law  
14 enforcement purpose?

15 A. I do.

16 Q. In reading that definition, are you clear as to what  
17 a -- is it clear to you as to what a legitimate law  
18 enforcement purpose is?

19 A. Yes.

20 Q. Okay. And this is one of the additions to the Consent  
21 Decree. Do you think it will be helpful to you in  
22 understanding your prohibition in the Consent Decree?

23 A. Yes.

24 Q. I would like you to look at Number 5, I believe, First  
25 Amendment-related intelligence, a phrase that the



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1 modification is proposing that would replace the phrase  
2 political intelligence. And could you go ahead and look at  
3 that definition.

4 A. Well, I think that the new definition would say -- it  
5 would strike out political. That would help, you know, clear  
6 up the confusion that we may have seen in the Labor Day  
7 parade. First Amendment-related intelligence is -- and  
8 there's some strike-out here.

9 Q. You can look on your screen.

10 A. Okay. That's better. "First Amendment-related  
11 intelligence is the gathering, indexing, filing, maintenance,  
12 storage or dissemination of information or any other  
13 investigative activity, which is undertaken due to or on the  
14 basis of a person's beliefs, opinions, associations or the  
15 content of the speech or expression protected by the First  
16 Amendment."

17 Q. Is that definition of First Amendment-related  
18 intelligence, do you feel like that's instructive on the type  
19 of intelligence that the Consent Decree is designed to  
20 protect?

21 A. Well, I think it's better than the political. I think  
22 it, you know, still will require, you know, some more  
23 explanation because of basically what I said about just all  
24 that's on a number of individuals' social media, but I do  
25 think it's a step in the right direction. So the way I would

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1 take it is that, you know, what we've said from the very,  
2 very start, that we respect any individual's right to  
3 protest, any individual's right to express their First  
4 Amendment rights. And we're going to protect that. And  
5 that's all we've done. We've been very consistent in that.

6 In that the only thing we want to do is ensure that  
7 those gatherings are done lawfully. And the Supreme Court  
8 has said that law enforcement can put restrictions on the  
9 time, the place that these events are going to occur and some  
10 other restrictions just to protect public safety. I think  
11 the courts have said that. And we will fully comply with the  
12 courts. That's why we have a permitting process.

13 I think this helps. This will clear up some of the  
14 ambiguity, but I still think that we still have challenges in  
15 making sure that this is applicable to today's modern  
16 technology and how people communicate and operate today.

17 MR. MCMULLEN: Your Honor, I'm about finished.  
18 But I do want to go down a line of questioning that Your  
19 Honor spoke to earlier.

20 THE COURT: Right. Do you want to take a break  
21 and go to your witnesses and let the Director come back? Is  
22 that what you need to do?

23 MR. MCMULLEN: Yeah. But I do want to finish off  
24 with one line of questioning about the volume of  
25 investigations.

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1 THE COURT: Sure.

2 MR. MCMULLEN: And I'm mindful of the Court.

3 THE COURT: Sure.

4 MR. MCMULLEN: I'm not trying to make a straw man  
5 argument, but I'm going to try to get this question framed  
6 such that I can make my point.

7 THE COURT: Sure. That's fine. And if there's  
8 an objection, I think Mr. Castelli can now -- will be able to  
9 speak. We've been working on making sure we can hear people.  
10 Go right ahead. Go right ahead.

11 BY MR. MCMULLEN:

12 Q. You have about 118,000 criminal investigations a year;  
13 is that --

14 A. 118 incident reports are filed. I can't say that each  
15 one of those rise to the level of a criminal investigation.

16 THE COURT: Right. And I think we all -- and  
17 that deserves a little clarification. And I know that we've  
18 all been around the subject so long that we may forget that  
19 others may not know. But Director, you get a lot of  
20 incident-related reports. That would be everyone you got,  
21 whether somebody called and said they had a missing dog or a  
22 cat or whether they had a missing child or they were  
23 reporting a homicide. That would be everything; is that  
24 right?

25 THE WITNESS: Not quite, Your Honor.

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1 THE COURT: Okay.

2 THE WITNESS: So the people that call 911 or call  
3 the nonemergency number, 545-COPS, those are calls for police  
4 service. And they're put into the CAD system, computer-aided  
5 dispatch, and an event is created. So the dispatch system is  
6 one totally different. So 1.6 million calls came into the  
7 911 call center last year. Officers were dispatched on  
8 940,000 calls.

9 So when I talk about an incident report that's  
10 filed, we're governed by TIBRS, Tennessee Incident Based  
11 Reporting System. And then there are TIBRS offenses that we  
12 report to TBI. TIBRS will dictate when a report can be taken  
13 and if it will be considered a criminal offense. For  
14 instance, every year there are 5,000 incidents of aggravated  
15 assault. 10,000 incidents of Internet partner violence.

16 And then when we get into the burglaries, the  
17 robberies, the rapes, the homicides, the shopliftings. I  
18 mean, it's just a unbelievable large amount. So when I say  
19 an incident report is filed, that's where a citizen contacted  
20 the police department, and a police officer took an offense  
21 report and entered that offense report into our records  
22 management system.

23 Of those 118,000 taken last year, on average, you  
24 know, 10,000 to 15,000 are memos that may not quite reach the  
25 level before they can be approved as an incident report. But

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1 a memo can be changed into an incident report. Normally an  
2 incident report is not changed into a memo. So I can almost  
3 say with confidence that at least a hundred thousand of those  
4 reports are legitimate TIBRS offenses that we are governed  
5 by, you know, TBI to report.

6 Then there's the National Incident Base Reporting  
7 System, that's NIBRS, that is really ran by the FBI. The FBI  
8 try and get all states to be NIBRS compliant, where we all  
9 report the same way. And they use a lot of data to pull the  
10 uniform crime report, for instance, is one tool that they  
11 use. So I can confidently say that at least 100,000 of those  
12 are true offenses, and that it is not related to calls for  
13 service.

14 THE COURT: And I understand that a little better  
15 for all of us and me particularly. Then the range of the  
16 incidences would be from what we might call misdemeanor  
17 reports. I don't know if that's right or not, all the way up  
18 to the most serious felony; is that right or wrong?

19 THE WITNESS: Yes, that's correct. That's  
20 correct, Judge.

21 THE COURT: Okay. And not to -- just to fill  
22 that out a little bit more. Would you give us an example of  
23 some of the lesser crimes or lesser-investigated activities  
24 versus some of the greater ones. Just examples so people  
25 will understand --

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1 THE WITNESS: Yes, sir.

2 THE COURT: -- the scope of it.

3 THE WITNESS: A great example -- a great  
4 question. So let's take you mentioned a missing child. So  
5 if a police officer calls and responds to a report of a  
6 missing child, the officer will, you know, kind of run down a  
7 series of questions and attempt to locate the child, you  
8 know, within a matter of minutes. But then the officer is  
9 going to generate an offense report. And you know, we want  
10 people to report missing children.

11 So once that officer generates that missing  
12 person's report, it generates a whole 'nother range of  
13 response. We may end up calling out our CART team. We  
14 recently were certified as one of the only handful of  
15 agencies that are certified to actually go and find missing  
16 children and be in compliance with everything. Another  
17 offense report is if an officer makes an arrest. Every  
18 arrest requires an offense report.

19 So if an officer makes a shoplifting arrest, they  
20 have to file a police report. If a citizen calls and says  
21 that their lawn mower was stolen from a storage area, that  
22 that would be a theft report. If their front door was kicked  
23 in and a TV taken, that would be a burglary report. If  
24 someone shot into their home, that could be an aggravated  
25 assault. It could also be a vandalism offense. And then

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1 obviously there are homicide, or we may call it a DOA  
2 unknown. And then there's a DOA known. So if there's a  
3 patient that is under a doctor's care that's elderly, very  
4 ill and, you know, the likelihood of them passing is there,  
5 and they pass, the officer may take a DOA known. A hospice  
6 patient, an officer may take a DOA known, where they're under  
7 a doctor's care. The doctor has signed a letter.

8           So there are just a whole very, very large number  
9 of reports. We generally track Part I offenses. And then  
10 when we look at violent crime, we're looking at murder, rape,  
11 robbery, and I think your aggravated assault offenses. But  
12 within those, there are other offenses, aggravated assault,  
13 aggravated assault DV, shoplifting. And so there are just so  
14 many offenses in there. And I hope I was able to answer your  
15 question.

16           THE COURT: I think it's helpful for context so  
17 that Mr. McMullen can ask the next question, Mr. McMullen.  
18 And do you want to continue or -- whenever you want to take a  
19 break for your next witness, you just let me know.

20           MR. MCMULLEN: Can I pick up this line of  
21 questioning with him tomorrow and we take a break? Take the  
22 other witnesses out of turn?

23           THE COURT: I think that's a good idea because  
24 we're concerned about -- I know you're concerned about  
25 getting our two witnesses off and on.

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1 Director, I don't think this means that  
2 Mr. McMullen is putting you in a secondary position. He let  
3 you go first, but I think we're going to let you be excused.  
4 Should we let the Director be excused for the rest of the  
5 day, Mr. McMullen?

6 MR. MCMULLEN: Yes, Your Honor.

7 THE COURT: All right. Well, we're very glad to  
8 have you, and of course, we talked about the fact that be  
9 ready to proceed for a test of the system at about 10 till or  
10 15 till the hour. And then, of course, we'll start right on  
11 time. We're going to conduct that test because of the  
12 technology just to be sure we're good. Always good to see  
13 you, Director.

14 THE WITNESS: Yes, sir.

15 THE COURT: And thank you so much.

16 THE WITNESS: Nice to see you too, sir.

17 THE COURT: Let you step aside.

18 And we're going to go to -- how much time do you  
19 need, Mr. McMullen? You just tell me.

20 MR. MCMULLEN: Five minutes. Five minutes, Your  
21 Honor.

22 THE COURT: That's fine. And we'll start the  
23 witness. We're going to take a ten-minute break because this  
24 will be part of the staff's break. And so it'll be a  
25 10-minute break. We'll come back at about 8 minutes after



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1 the hour. So thank you so much. We'll see everybody in 10  
2 minutes. Thank you.

3 (Short break.)

4 THE COURT: I think we may have everyone. I'm  
5 not sure.

6 Mr. Glover, are you handling this matter?

7 MR. GLOVER: I'm handling this witness, Your  
8 Honor.

9 THE COURT: All right. And I think I see a  
10 witness. Do I see a witness there?

11 MR. GLOVER: I believe you see Deputy Chief Don  
12 Crowe.

13 THE COURT: I see him. I've seen him before. So  
14 I'm just checking to make sure we have everybody, including  
15 the Monitor. There we go. We have everyone now. All right.

16 Mr. Glover, who do you wish to call as your next  
17 witness?

18 MR. GLOVER: Your Honor, at this time, the City  
19 would like to call Deputy Director Don Crowe from the Memphis  
20 Police Department.

21 THE COURT: Yes. And deputy Director, if you'll  
22 raise your right hand, Mr. Sample is going to swear you in.

23

24

25

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\* \* \*

**DONALD CROWE,**

**was called as a witness and having first been duly sworn  
testified as follows:**

**DIRECT EXAMINATION**

**QUESTIONS BY MR. GLOVER:**

Q. Deputy Chief Crowe, would you state your full name for  
the record and spell it for the court reporter, please.

A. Yes, sir. Donald Crowe, C-R-O-W-E.

Q. All right, sir. And what is your position with the  
Memphis Police Department?

A. I am a deputy chief for the Memphis Police Department.

Q. When did you join the Memphis Police Department?

A. 1988.

Q. Can you briefly describe your progression through the  
ranks and the positions you've held.

A. Yes, sir. So I graduated from the Memphis Police  
Department Training Academy in 1988. Immediately went to the  
Uniform Patrol Division of the Memphis Police Department,  
basically driving a marked squad car. While a patrolman for  
the Memphis Police Department I did different assignments  
through the year 2000. Promoted to the rank of sergeant.  
Was assigned to the detective bureau.

The year 2005 I was promoted to the rank of  
lieutenant, and I became a supervisor in the detective

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1 bureau. In the year 2013 I was promoted to the rank of  
2 major. Again, went to a uniform patrol station to command  
3 the patrol station. Then in 2013 I transferred back to the  
4 detective division as a major to command detective unit.

5 2016 I promoted to the rank of lieutenant colonel and  
6 became the commander of investigative services for the  
7 Memphis Police Department. And then in 2017, I promoted to  
8 the rank of the deputy chief for the Memphis Police  
9 Department.

10 Q. All right, sir. Thank you for that. So is it fair to  
11 say that all of your professional career has been with the  
12 Memphis Police Department?

13 A. Yes, sir.

14 Q. And what -- when you became the deputy chief in 2017,  
15 what were your primary responsibilities?

16 A. I was appointed deputy chief for information  
17 technology for the Memphis Police Department. So information  
18 technology encompasses anything IT related for the Memphis  
19 Police Department. That includes all of our computer systems  
20 and all of our technology as it relates to body-worn cameras,  
21 pole-mounted cameras, realtime crime center and management of  
22 all of our databases.

23 Q. Is Homeland Security under your area as well?

24 A. Yes, sir.

25 Q. Okay. Are those still your responsibilities today?

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1 A. Yes, sir.

2 Q. Okay. In your experience, Deputy Chief Crowe, is the  
3 use of a video system or video systems, which you supervise  
4 for the police department, what you would consider a crucial  
5 part of the Memphis Police Department's public safety  
6 protocol and mission?

7 A. Yes, sir.

8 Q. Okay. Is this true, as far as you know from your  
9 activities with other agencies, is this true across the  
10 country in most agencies?

11 A. Yes, sir. So I've had the pleasure of assisting other  
12 agencies across the country. And we always discuss and look  
13 at their camera program, discuss and look at ours. And that  
14 does include the video cameras in the field, but it also  
15 includes the body-worn camera program.

16 Q. All right. Just for background, you were present,  
17 were you not, during the initial trial in 2018 when the City  
18 was found to be in violation of what we call the Kendrick  
19 Consent Decree?

20 A. Yes, sir.

21 Q. And so you have been involved in matters relating to  
22 attempts to come into compliance and understand our  
23 responsibilities, at least from that day forward; is that  
24 correct?

25 A. That's correct.

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1 Q. And so have you had quite a number of officers and  
2 even command staff consult with you about issues and  
3 questions they might have about the applicability of the  
4 Kendrick Consent Decree in various cases?

5 A. Yes, sir.

6 Q. We're going to ask you some about that, but I want to  
7 ask you if you have it, do you have a copy of the original  
8 Consent Decree, Kendrick Consent Decree that's been marked as  
9 an exhibit in this case. Number 19, it's already been  
10 admitted in the case.

11 A. I do not have a copy with me.

12 Q. All right. I'm going to hand you a copy so you'll  
13 have that for reference. So this is Exhibit 19. And are you  
14 familiar with that Decree?

15 A. Yes, sir.

16 Q. Since that ruling I think we talked about you have had  
17 officers question you in light of Judge McCalla's  
18 enlightening us on the clear meaning of many of the  
19 provisions of that document. You've been asked to give  
20 information to other officers about how you believe certain  
21 scenarios would be affected by that Decree; is that correct?

22 A. That is correct, yes.

23 Q. Do you recall there being a situation that came up in  
24 connection with security cameras? And I don't know if this  
25 is the Blue CRUSH camera. I'll let you tell me. But a

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1 camera that points down toward the plaza in front of City  
2 Hall that's adjacent to the Federal Building.

3 A. Yes, sir.

4 Q. And is there a Memphis Police Department camera there  
5 that's under your agency's supervision?

6 A. Yes, sir.

7 Q. Okay. Do you recall after the trial of this case in  
8 one of the issues of trying to ensure compliance with your  
9 agency's part, your group's part of the Decree, a question  
10 arose about the fact that that's an area where there are  
11 always a lot of public gatherings for people who are  
12 expressing their First Amendment rights, correct?

13 A. Yes, sir.

14 Q. Did you have occasion to have the city chief legal  
15 officer make inquiry about if that camera could remain on and  
16 in use when there was a known First Amendment activity going  
17 on at the time?

18 A. Yes, sir.

19 Q. Okay. Do you recall what response or do you recall  
20 how the chief legal officer for the City tried to resolve  
21 that?

22 A. Yes, sir.

23 Q. And what, to your knowledge, did she do?

24 A. The chief legal officer asked us to disconnect the  
25 pan, tilt, zoom on that camera and only use the fixed cameras

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1 on it and also to disconnect the pan, tilt, zoom on the  
2 security cameras attached to the building at 170 North Main.

3 Q. Do you know whether that was done in response to  
4 advice that you were told came from the Monitor?

5 A. Yes, sir. It was.

6 Q. Okay. Let me just make sure I understand the  
7 technology. Tell me how that camera in particular functions  
8 from a technological standpoint. You talk about pan, tilt,  
9 zoom. What was that camera capable of doing before it was  
10 modified?

11 A. Yes, sir. So on the civic plaza, where the State  
12 Building used to be, the County Building, Memphis Police  
13 Department headquarters, the Federal Building and also City  
14 Hall. On the trolley tracks, we have a Blue CRUSH camera  
15 mounted on a pole, and that is identical to the cameras that  
16 you see throughout Memphis in that it would be a gray box  
17 mounted on a pole. And on that gray box would be a blinking  
18 blue light and markers indicating that that camera belongs to  
19 the Memphis Police Department.

20 Typical of the configuration, it has three cameras  
21 inside the enclosure. Two of those cameras are fixed, in  
22 that they are pointed. And once they're pointed, they cannot  
23 be moved unless you drive a truck out there and physically  
24 move the camera. The third camera in that configuration is  
25 typically a pan-tilt-zoom camera. So the camera operator can

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1 move the camera to whatever direction is needed. Also to try  
2 to zoom in, if needed.

3 Q. So if I understand this correctly, would it be  
4 possible for someone in, say, the Real Time Crime Center to  
5 have a live feed into that camera, if they chose to do so and  
6 then operate that zoom and pan and tilt feature of the  
7 camera?

8 A. Correct.

9 Q. Okay. And after receiving the advice through the  
10 chief legal officer or the city attorney that came from the  
11 Monitor, what steps did you take with regard to the  
12 availability of those features on the camera?

13 A. Sure. So we ordered our camera team to contact the  
14 vendor and on that particular camera to disconnect the pan,  
15 tilt, zoom feature of it. And also to change the recording  
16 time on the recorder inside the enclosure.

17 Q. All right. So I can understand what effect that would  
18 or wouldn't have, if I were, for example, standing down in  
19 that plaza participating in a gathering expressing our First  
20 Amendment right and I reached into my pocket and drew  
21 something out like my phone, but from a distance, it's not  
22 always possible to identify what an object is, before that  
23 pan, tilt, zoom was disabled, could the RTC officer looking  
24 at the feed zoom in to see what I had in my hand?

25 A. Yes, sir.



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1 Q. And hopefully try to identify what it was and whether  
2 it was anything dangerous?

3 A. Yes, sir.

4 Q. After that function was disabled, can we do that now?

5 A. No, sir.

6 Q. Okay. So if someone draws an article from his or her  
7 pocket or purse, it is not now possible for us to use the  
8 zoom feature to try to identify the object; is that right?

9 A. Correct.

10 Q. And is it possible for us to tilt around and follow  
11 someone who's walking who may have taken that object out of  
12 their pocket or purse?

13 A. No, sir.

14 Q. Okay. Do you have a view as a law enforcement officer  
15 about -- and in charge of the technology section whether that  
16 affects the Memphis Police Department's ability to keep the  
17 public safe, based on your experience?

18 A. Yes, sir. I do.

19 Q. What is your view?

20 A. So the role of the Real Time Crime Center in these  
21 situations is to support the commander that's on the ground.  
22 Be a support unit for them. The commander on the ground  
23 needs us to help identify an object in someone's hand or a  
24 dangerous situation. That's what we would want to do so that  
25 an officer does not have to get close enough to identify a

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1 dangerous situation on their own. So it's about trying to  
2 keep the public safe.

3 Q. All right. Moving on to other situations involving  
4 cameras, are the body-worn cameras and is the body-worn  
5 camera program under your direction?

6 A. Yes, sir.

7 Q. Okay. I believe that there was submitted prior to the  
8 beginning of this trial a set of documents by the Defendant,  
9 one of which has not yet been entered into evidence, but when  
10 tendered, it was marked Defendant's Exhibit 16.

11 And once I ask the witness to look at it, I would like  
12 to mark it as the next sequential trial exhibit, which is the  
13 Memphis Police Department body-worn camera policy.

14 So I'm going to hand you this document, which will not  
15 be marked for purposes of this trial Defendant's 16 but for  
16 purposes of people locating it who had a pretrial production,  
17 that's how it was marked. Do you recognize the document I've  
18 handed you?

19 A. Yes, sir.

20 MR. GLOVER: Can we pull it up on to the screen  
21 please, so it can be viewed.

22 BY MR. GLOVER:

23 Q. Can you identify that as being the Memphis Police  
24 Department body-worn camera policy?

25 A. Yes, sir. It is.

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1 MR. GLOVER: Your Honor, I'd like to move that  
2 into evidence as the next numbered exhibit.

3 THE COURT: That's fine, it will be marked and  
4 received as 20.

5 (WHEREUPON, the above-mentioned document was  
6 marked as Exhibit Number 20.)

7 BY MR. GLOVER:

8 Q. You testified about people raising issues or concerns  
9 about how to interpret the Decree in certain circumstances.  
10 Have there been questions arise with regard to when and when  
11 not to have a body-worn camera filming, activated so that  
12 it's filming when people may be exercising their First  
13 Amendment right, whether it's a gathering to express First  
14 Amendment speech or a protest or the First Amendment covers  
15 even real and association. So has that question come up from  
16 officers about how they're supposed to deal with their  
17 body-worn cameras when they suspect or believe they're  
18 witnessing a First Amendment activity?

19 A. Yes, sir.

20 Q. And what kind of questions have come up about that?

21 A. Mostly supervisors that ask those questions about the  
22 body-worn cameras. It is how does the body-worn camera and  
23 the Kendrick Decree affect each other, and what is allowed  
24 and what is not allowed in the Consent Decree.

25 Q. As it now stands, of course, the Kendrick Decree,

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1 being a document which came about in 1978, it doesn't  
2 specifically reference body-worn camera, does it?

3 A. Correct.

4 Q. Just like it doesn't specifically reference social  
5 media platforms or the Internet, does it?

6 A. Correct.

7 Q. Okay. So have you been required to seek advice at  
8 times about whether the Kendrick Decree would affect what are  
9 otherwise the stated policies on keeping body-worn cameras in  
10 operation under the policies that have been marked as the  
11 most recent exhibit?

12 A. Yes, sir.

13 Q. Okay. Are you aware that there was a -- because of  
14 your responsibility for this area, were you made aware that  
15 there was a filing in court during this monitoring process  
16 where various scenarios were discussed --

17 MR. GLOVER: And although this is a document  
18 under seal, Your Honor, so I'll be careful before I go any  
19 further.

20 BY MR. GLOVER:

21 Q. -- where there was kind of an advisory discussion from  
22 the Monitor team of how cameras, body-worn cameras, might be  
23 affected by this policy; are you aware of that?

24 A. Yes, sir.

25 Q. And have you had a reference to that?

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1 A. I have not seen the filing, no, sir, but I've had  
2 discussions about it.

3 Q. Okay. And are you aware that it indicated that there  
4 were -- that the monitoring team was of two different views  
5 on that point?

6 A. Correct.

7 Q. So you were not able to get clarity from that, at  
8 least, about what is the best way to proceed with the  
9 body-worn camera policy?

10 A. Exactly. Yes, sir.

11 Q. You're aware, are you not, that we've been attempting,  
12 the City has, to reach agreements and have successfully  
13 reached tentative agreements that we put before this Court  
14 with the ACLU about how to deal with a number of issues where  
15 there was lack of clarity or questions about the Consent  
16 Decree. And one of those that has been addressed in those  
17 discussions has now been put before the Court is one that  
18 deals directly with how one would respond to the body-worn  
19 camera situation when at a First Amendment event; is that  
20 right?

21 A. Yes, sir.

22 Q. Would that provision, in your opinion, create  
23 additional clarity for us to instruct our officers to make  
24 sure they're in compliance?

25 A. It would. Yes, sir.

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1 Q. From the standpoint of good law enforcement, as you  
2 see it, in the technology area, is it important that if you  
3 have a body-worn camera policy, it's clear and concise, and  
4 the officers are supposed to abide by it at all times?

5 A. Yes, sir. We strive for something that's clear,  
6 simple and easy to apply in the field.

7 Q. And without the clarification that we're seeking from  
8 the Court, is it your view that it could leave an officer in  
9 a position of trying to determine whether what he is seeing  
10 or what she is seeing is a First Amendment event or is not a  
11 First Amendment event, you know, right of associations in the  
12 First Amendment. Various kinds of speech are included. And  
13 that that clarity would allow you to enforce the policy and  
14 ensure compliance with the Decree in a more concrete and  
15 direct way?

16 A. Yes, sir.

17 Q. Okay. Have officers or their supervisors come to you  
18 to ask for clarification about questions on social media use?

19 A. Yes, sir.

20 Q. As it relates to their lack of certainty about their  
21 own readings of the Consent Decree?

22 A. Yes, sir.

23 Q. Okay. Do you -- how do you respond to them, and what  
24 do you tell them to do to gain clarity?

25 A. I always refer them back to the Kendrick Decree, which

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1 is posted on the MPD support page. And I want them to read  
2 it themselves. I refer them to departmental regulation 138  
3 that talks about compliance with the Decree and political  
4 intelligence. Then I refer them to the 2018 ruling by Judge  
5 McCalla here in Memphis, rule clarification. Then I do my  
6 best to explain what I understand about it.

7 Q. All right. Do you believe it would be helpful in your  
8 opinion in training your officers to have Judge McCalla's  
9 good explanations incorporated into some of the language of  
10 the Decree so that when posted as the Decree requires it to  
11 be posted, so officers can look at it, they can see that  
12 clarity in the document itself?

13 A. Yes, sir. I believe it would.

14 Q. Okay. The Consent Decree does have provisions in it,  
15 does it not, that require that the Decree be posted, made  
16 available, distributed to officers and taught, correct?

17 A. Yes, sir.

18 Q. So does that provision give you a desire to  
19 incorporate as many of the Judge's clarifications into the  
20 document itself so that officers can get that clarity  
21 straight from the posted document?

22 A. Yes.

23 Q. In your own attempts to understand questions that may  
24 arise from applications of the Decree, do you find that you  
25 spend more time referring to the Decree or to Judge McCalla's

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1 rulings?

2 A. To the 2018 ruling.

3 Q. Okay. And why is that?

4 A. Because it has more language, more information about  
5 current technology and current practices that we do than what  
6 the Kendrick Decree does.

7 Q. Do you have a view as to whether having that kind of  
8 clear language about specific technologies in the Decree  
9 itself would be of benefit to the police force?

10 A. I know it would. Yes, sir.

11 Q. Okay. Thank you. I'm going to ask you to look back  
12 at the Kendrick Consent Decree again. And refer you to the  
13 paragraph that defines political intelligence, which is  
14 paragraphed in the definition Section B4. Do you see that?

15 A. Yes.

16 Q. Is that something that you've referred to and pored  
17 over a number of times in connection with your duties during  
18 the last two years?

19 A. Yes, sir.

20 Q. You understand that there has been some clarification,  
21 as you indicated, through the Judge's rulings, right?

22 A. Yes, sir.

23 Q. And in one ruling in particular, I think he used some  
24 language that may have related to legitimate law enforcement  
25 purposes, correct?



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1 A. Correct.

2 Q. And so you are able to read that definition now with  
3 the teaching we've gotten from that ruling involving  
4 legitimate law enforcement purposes. But legitimate law  
5 enforcement purposes, is it defined in the Consent Decree, as  
6 it now stands?

7 A. No, sir.

8 Q. Would it be helpful to you, as one of the senior  
9 police officers in enforcing this Decree's compliance, to  
10 have a definition of legitimate law enforcement in the Decree  
11 itself?

12 A. Yes, sir. It would.

13 Q. Do you know whether that is part of what the  
14 discussion has been with the ACLU about arriving at a  
15 mutually agreeable term to accomplish that?

16 A. Yes, sir. It is.

17 Q. All right. And have you reviewed that particular term  
18 as it is proposed in the submitted proposed joint Decree to  
19 be able to inform the Court now whether that definition would  
20 add clarity and in your opinion allow you to enforce the  
21 performance of the Decree within the department better?

22 A. Yes, it would.

23 Q. Okay.

24 MR. GLOVER: Your Honor, I would like to, if I  
25 could, introduce a document now that, while it may seem

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1 duplicative, I don't think it really is. It is the proposed  
2 modified order judgment and Decree in a form that we have  
3 submitted to the Court as Defendant's proposed Exhibit  
4 Number 3, and it is a redline copy --

5 THE COURT: Right. I think --

6 MR. GLOVER: -- of the proposed modified Decree  
7 so that we can see what the original Decree would look like  
8 and what the proposed modification would do in terms of  
9 changes if they or any of them are accepted by the Court.

10 THE COURT: That's fine and it is helpful. I  
11 have no reason we shouldn't do that. Seeing no objections --

12 MR. GLOVER: Right.

13 THE COURT: -- we're going to mark that as 21.  
14 This is a redline and it is a little easier to follow.  
15 Absolutely.

16 MR. GLOVER: Thank you.

17 THE COURT: Marked and received as 21.

18 (WHEREUPON, the above-mentioned document was  
19 marked as Exhibit Number 21.)

20 BY MR. GLOVER:

21 Q. Back on the definition of political intelligence  
22 that's in the existing Decree, we've had other witnesses  
23 testify and you haven't been in the room, but that they find  
24 some of the language in this Decree to be problematic in  
25 their interpretation. One of the problems appears to arise

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1 from the portion that talks about any other investigative  
2 activity. There's an enumerated list of activity that would  
3 be political intelligence. Then there's one that says any  
4 other investigative activity. Is that a phrase about which  
5 you think we could benefit from additional explanation from  
6 the Court in the form of modified language?

7 A. Yes, sir. So when a policeman reads that, it's vague  
8 enough that the policeman does not quite understand it. It's  
9 prohibited.

10 Q. In your knowledge has this caused some police officers  
11 to refrain from doing some kinds of social media searches  
12 that you think they probably could do under the Judge's  
13 ruling, but their reference to this language has caused them  
14 not to do so?

15 A. When they ask me that question, I always tell them to  
16 err on the side of caution. If there's any question at all  
17 about if it would be a violation under the Kendrick Decree,  
18 not to proceed.

19 Q. Has another section of that language in the original  
20 Decree, which talks about any other investigative activity,  
21 quote, relating to any person's beliefs, opinions or  
22 associations, has that come up in your discussions with  
23 officers about whether that broadens the restriction to the  
24 point that they might not be able to look at platforms like  
25 facebook that in and of themselves are designed for First

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1 Amendment expression?

2 A. Yes.

3 Q. And so is that something that -- and not for a moment  
4 setting up straw man because that's not what -- the Judge has  
5 ruled that we're not able to do that. But would it be  
6 helpful in administering this order and in enforcing it and  
7 its compliance within the department to have clarification of  
8 that issue?

9 A. Yes, sir. It would.

10 Q. Is that something that has been dealt with with the  
11 ACLU in discussions to try to come up with proposed language  
12 that would satisfy our need for clarity and still protect the  
13 rights of the citizens of Memphis and their civil liberties?

14 A. Yes, sir.

15 Q. And is that part of the language that's in this newly  
16 marked exhibit that reflects the redlines showing what's in  
17 and what's out of the proposed Decree?

18 A. Yes.

19 THE COURT: Right. Normally, what we would do if  
20 we were in court in person is that those portions that you're  
21 discussing would be put up on the screen so that everyone can  
22 see.

23 MR. GLOVER: Right.

24 THE COURT: I think that's probably useful, and  
25 it probably is useful to everybody. That's exactly -- thank

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1 you so much. Because I know a lot of people want to see what  
2 you're talking about.

3 MR. GLOVER: All right. First, if we could,  
4 Ms. Tullis, if you could just pull the front page up so that  
5 people viewing can see that we're dealing with a document  
6 that's entitled Proposed Modified Order Judgment and Decree.

7 BY MR. GLOVER:

8 Q. And if I understand it correctly and I think that I do  
9 the proposed modified language is obviously in blue, that  
10 indicates that this is new language that isn't in the  
11 existing Decree. And everywhere in this document where you  
12 see blue language, it is language that was not previously in  
13 the original Kendrick Decree; is that correct?

14 A. Yes.

15 Q. Okay. When we see red and strikeouts, that is  
16 language that was in the Decree that under this proposal  
17 would no longer be in the Decree; is that correct?

18 A. Yes, sir.

19 Q. Okay. So let's go down to the definition that we just  
20 talked about of political intelligence. We'll look at that  
21 section. And is it pulled up on the screen? Paragraph under  
22 definition Section B, Number 5.

23 A. Yes, sir.

24 Q. One of the changes that is proposed, is it not, is  
25 changing the name of that subparagraph from political

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1 intelligence to First Amendment-related intelligence?

2 A. Yes, sir.

3 Q. Does that have any genesis in misconstruing  
4 misconceptions that officers may have had about what is and  
5 isn't political intelligence?

6 A. Yes, sir. It does.

7 Q. Do you find that the use of the word "political" seems  
8 to take people off in the wrong direction at times?

9 A. Yes, sir.

10 Q. Okay. And do you have an opinion about whether even  
11 just changing the title would prevent that initial  
12 misunderstanding when people begin to read the Decree?

13 A. I believe it would.

14 Q. All right. And you'll see that what is stricken in  
15 this document in red is the "relating to any" language. And  
16 it changes the proposed language to "which is undertaken due  
17 to or on the basis of a person's beliefs, opinions,  
18 associations or the content of the speech or expression  
19 protected by the First Amendment."

20 Do you see that?

21 A. Yes, sir.

22 Q. Is that a definition, if accepted by the Court, that  
23 you could teach and enforce within the police department?

24 A. Yes, sir. We could.

25 Q. Does it remove the ambiguity that you find has caused

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1 questions to arise within the police force?

2 A. I think it provides clarity. Yes, sir.

3 Q. Do you see on the following page under Definition 6,  
4 there is a definition. It's all in blue. It's actually  
5 Number 7. I'm sorry. Number 7. Social media is defined.

6 A. Yes, sir.

7 Q. Do you find that the absence of any reference to  
8 social media in the original Decree caused confusion and  
9 caused some officers not to actually utilize social media in  
10 investigations that otherwise would have called for it?

11 A. Yes, sir.

12 Q. Okay. Do you have a view as to whether the insertion  
13 of this particular definition would aid you in helping to  
14 ensure that the police force complies with the spirit of the  
15 Decree and carries out investigations in conformity with its  
16 intended purpose?

17 A. Yes, sir. I believe it will.

18 Q. Okay. Without changing that, if it were not changed,  
19 do you believe you would continue to experience difficulties  
20 with teaching new officers how and when to use and not use  
21 social media?

22 A. Yes, sir.

23 Q. Okay. And once again, we do post and teach on the  
24 Decree, do we not?

25 A. Yes, sir.

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1 Q. So if we put a change, if the Judge allows a change of  
2 any kind, this, or any others, it would then be part of the  
3 posted, what the officers are required to review and  
4 understand, and part of what is taught?

5 A. Yes, sir.

6 Q. The next section, Subsection 8 is the definition of  
7 undercover accounts. That was not in the Decree before; is  
8 that right?

9 A. Correct.

10 Q. Most of the time we have been talking in this case  
11 about undercover account, it's related to someone who's  
12 conducting -- a police officer who's conducting a search in  
13 an undercover social media account, correct?

14 A. Correct.

15 Q. And since no social media existed at the time of 1978,  
16 any understanding of undercover account would not have  
17 necessarily taken into account social media use of undercover  
18 accounts, correct?

19 A. Right.

20 Q. Does this definition of undercover account actually  
21 reference the social media so that it clarifies the  
22 application of the various restrictions of the Decree to  
23 people who are undercover on a social media account?

24 A. Yes, sir. It does.

25 Q. And are you comfortable that the assertion of this



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1 Decree would aid the department in teaching and enforcing  
2 compliance with the terms of this Decree by actually having  
3 that term defined?

4 A. Yes, sir.

5 Q. The next change on there is First Amendment-related  
6 intelligence. It initially read political intelligence,  
7 Subsection C, directly under the paragraph we were just  
8 discussing. The conversation we had earlier about the  
9 confusion that the word "political" seemed to be causing  
10 within the department is addressed in this proposed change,  
11 correct?

12 A. Yes, sir.

13 Q. And can you explain why, to the Judge, why you think  
14 this would be a change that would continue to protect the  
15 civil liberties that are anticipated in this Decree, while  
16 clarifying to the police officers what we're talking about?

17 A. Yes, sir. So I think it takes the language from the  
18 2018 ruling and puts it in a common sense format that our  
19 officers can understand and our supervisors can understand.

20 Q. All right. In your view was it the intention of the  
21 City or as far as you know, the effect of the changes that  
22 we've talked so far should in any way reduce any of the  
23 protections of Memphians' civil liberties that were  
24 originally anticipated and articulated in the Kendrick  
25 Consent Decree?

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1 A. No, sir.

2 Q. So we are looking for clarity as opposed to change in  
3 concept; is that correct?

4 A. Correct.

5 Q. Okay.

6 A. We're looking for clarity for the officers.

7 Q. All right. Thank you.

8 These have been covered by other witnesses and will be  
9 covered by future witnesses, but if you'll look down at  
10 Section D2, I'd like for you to comment on that one. It  
11 says, "The Memphis Police Department may view information  
12 posted to social media for legitimate law enforcement  
13 purposes."

14 And that's -- we have a proposed definition for that,  
15 correct?

16 A. Yes, sir.

17 Q. "So long as it does not improperly catalog and  
18 disseminate that information pursuant to Section H. This  
19 viewing of information posts to social media includes  
20 conducting threat assessments."

21 Do you see that?

22 A. Yes, sir.

23 Q. There has been some comment to the effect that the  
24 discussion of threat assessments, assessments being included  
25 might not be an appropriate part of law enforcement,

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1 legitimate law enforcement activities. Can you tell me what  
2 the police department is talking about when they talk about a  
3 threat assessment?

4 A. Yes, sir. So we ask our Homeland Security team to do  
5 threat assessments for certain events. And a very good  
6 example would be the St. Jude marathon, where we know we have  
7 30,000 runners participate in the marathon. Approximately  
8 50,000 people attend downtown. We want to know the  
9 likelihood of an event occurring that would cause harm to the  
10 participants in that.

11 Q. All right. And so do you believe that that's a proper  
12 police function that should be considered part of legitimate  
13 law enforcement purposes?

14 A. Yes, sir. We do.

15 Q. Okay. You'll see that the language talks about the  
16 nature of social media and some of the events that occur in  
17 social media, and is it your testimony, do you have testimony  
18 about whether this is an attempt to put into the order the  
19 clarification that the Judge has made in his various rulings  
20 about how the Decree would apply in the social media era?

21 A. Yes, sir.

22 Q. Okay. Is it your intention to reduce the civil rights  
23 of any of our citizens by putting in or altering this  
24 language?

25 A. No, sir. Our goal is to comply with the Consent

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1 Decree.

2 Q. Okay. Subsection E below that, other than a typo, it  
3 takes out entitled Prohibition Against Covert Surveillance  
4 for First Amendment-Related Intelligence. So this -- correct  
5 me if I'm wrong -- it changes the title to reflect the  
6 hoped-for and anticipated change of the definition of  
7 political intelligence to another name, right?

8 A. Yes, sir.

9 Q. And it talks about -- it inserts a definition for the  
10 purpose of First Amendment-related intelligence in place of  
11 the reference to political intelligence. But do you view  
12 that paragraph as just a housekeeping issue, not a change in  
13 tenor but a housekeeping issue to reflect what our requested  
14 change is in the definitions would carry into other parts of  
15 the Decree?

16 A. Yes, sir.

17 Q. Okay. There is a section, Subsection 2 of F, that  
18 talks about undercover accounts; do you see that?

19 A. Yes, sir.

20 Q. Okay. The question I have for you is this. You said  
21 you've read through Judge McCalla's opinions and rulings?

22 A. Yes, sir.

23 Q. And you've tried to advise officers to do the same?

24 A. (Nodded head affirmatively.)

25 Q. Is this Subsection 2 the attempt of the City of

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1 Memphis and the ACLU to agree on some language that would  
2 incorporate into the Decree itself the rationale and ruling  
3 of the Court?

4 A. Yes, sir. It is.

5 Q. And we understand, of course, that the Court is the  
6 final arbiter of what language would suit his ruling, but the  
7 intent of putting this in, is it your testimony was to try to  
8 bring in to the Decree an understanding of the Court's view  
9 of how this would apply in an age of social media, where  
10 people sometimes become involved in undercover activities on  
11 the Internet?

12 A. Yes, sir.

13 Q. There's a protective provision then added -- I'm sorry  
14 -- on the next page on Subsection B, where it talks about a  
15 requirement that the police department implement supervisory  
16 controls to ensure all undercover social media accounts are  
17 not being used or created to violate the Consent Decree or  
18 otherwise infiltrate or identify groups expressing their  
19 First Amendment rights; do you see that?

20 A. Yes, sir.

21 Q. And we're not shying away from this. We recall that  
22 during trial, the Court found that one, at least one  
23 officer's views of this social media account would have  
24 violated that provision. And this makes clear that we  
25 commit, does it not, that we commit to implementing

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1 supervisory controls to ensure that that kind of thing does  
2 not happen again?

3 A. Yes, sir.

4 Q. Okay.

5 MR. GLOVER: And again, it seems like I'm  
6 skipping. Your Honor, I am, and it's just because some  
7 witnesses speak to some provisions of this. Other witnesses  
8 speak to other provisions, and we don't want to duplicate  
9 that conversation with four or five different witnesses.

10 BY MR. GLOVER:

11 Q. But if you would turn over with me to Section G8,  
12 which is a couple of pages over.

13 A. Yes, sir.

14 Q. I want to ask you about your view of the need for a  
15 provision like Subsection 8. You're aware from your  
16 supervisory position in the Memphis Police Department that  
17 the Memphis Police Department has officers who engage in  
18 activities, such as the Internet Crimes Against Children  
19 division, correct?

20 A. Yes, sir.

21 Q. And is it your understanding that much of the  
22 nefarious activity that tends to happen with regard to things  
23 like child pornography or human trafficking occurs through  
24 communications on the Internet?

25 A. Yes, sir.

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1 Q. And was part of the request and discussion with the  
2 ACLU about this provision an attempt to say there are some  
3 kinds of crimes that happen almost exclusively on the  
4 Internet, but we have a need to more or less constantly  
5 monitor to prevent those kinds of -- those examples of crimes  
6 against children but also intrusions into private networks,  
7 you know, cybercrimes, things like that that are  
8 intrinsically Internet related and that we would ask the  
9 Court to consider a provision that would let those kinds of  
10 investigations be ongoing without individual Subsection G  
11 authorization, but with a requirement that the Director  
12 review and audit those periodically to ensure that nobody's  
13 running afoul of the intention of the Decree; is that right?

14 A. It is.

15 Q. And is that a matter that you believe comes from the  
16 fact that just that is an almost continuous need to be  
17 monitoring for those kinds of activities?

18 A. Absolutely. Yes, sir.

19 Q. Okay. Thank you. Over on Section H, Item 3. I'm  
20 going to ask you to talk about that for a moment. This is --  
21 three and four are all new sections. And I'd ask you whether  
22 the original Kendrick Decree, to your knowledge, had any  
23 provisions in it that specifically talked about modern  
24 technology cameras with things like the pan, tilt, zoom we  
25 talked about earlier, or whether it just talks generically

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1 about information.

2 A. Just talks generically about information.

3 Q. Are paragraphs 3 and 4 the negotiated attempts of the  
4 parties, to your knowledge, to simply address and bring  
5 discussion of those specific technologies into the Decree and  
6 subject those things to the protections of the Decree but  
7 clarify when and how those protections intersect with this  
8 modern technology that's described here?

9 A. That is correct.

10 Q. Is it the police department's intention to try to  
11 reduce the protections that were provided by the original  
12 Consent Decree by incorporating this language?

13 A. No, sir.

14 Q. Okay. And does it specifically address, for example,  
15 two things we talked about, the pan-tilt-zoom function on the  
16 camera, correct?

17 A. Yes, sir.

18 Q. And the use of body-worn cameras?

19 A. Yes, sir.

20 Q. And we talked about pan, tilt, zoom. I'm not sure I  
21 talked with you enough about the body-worn camera provision.  
22 But would this proposal, if accepted or even accepted on a  
23 modified basis by the Court, allow the use of body-worn  
24 cameras in all circumstances, as long as we comply with our  
25 previously marked policies on body-worn cameras generally?



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1 A. Yes, sir. It would.

2 Q. And it would prevent an officer from having to decide  
3 am I or am I not now witnessing a First Amendment act. They  
4 would just be required to follow the body-worn camera policy,  
5 period, right?

6 A. Correct.

7 Q. Okay. And my question to you, to your knowledge, have  
8 our body-worn camera policies been shared with the ACLU so  
9 that they can see what those are?

10 A. Yes, sir. They have.

11 Q. And have any questions been raised about deficiencies  
12 that you know of with the policies not -- we're not saying  
13 they might not want to see something different, but they have  
14 not objected to this provision in the Consent Decree,  
15 correct?

16 A. Correct.

17 Q. Okay. You are -- on the next subsection, I, you are  
18 aware, are you not, that the Memphis Police Department  
19 engages in joint operations with a number of other agencies,  
20 correct?

21 A. Yes, sir.

22 Q. And I think that we've had enough testimony about the  
23 specifics of many of them, but that includes the FBI; is that  
24 right?

25 A. Right.

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1 Q. The DEA?

2 A. Yes, sir.

3 Q. The sheriff's department?

4 A. Yes, sir.

5 Q. Name me a few others.

6 A. Secret Service, U.S. Marshals Service.

7 Q. And when we are involved in those joint operations,

8 you are aware, are you not, that in one ruling the Judge

9 made, and you indicated you've read them, he actually

10 addressed and gave some instruction about how the Decree does

11 and does not implicate some of those joint activities,

12 correct?

13 A. Yes, sir.

14 Q. If one of the monitor team's experts has testified

15 that his belief is that one would need to vet any information

16 that comes from other agencies when in a joint operation,

17 before we could accept it to make sure it's compliant with

18 our Consent Decree in the way it was gathered, would that

19 create some ambiguity to you that would need the Judge to

20 bring his ruling into the body of the Decree for clarity?

21 A. Yes.

22 Q. Would that be helpful to you in understanding how to

23 instruct folks on what they can and can't accept or act upon

24 when it comes from another agency or the public?

25 A. Yes, sir.

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1 Q. Okay.

2 MR. GLOVER: Your Honor, we have something that I  
3 want to get into that's a little bit out of line because  
4 we've gone through portions of the Decree, but we have a  
5 demonstrative exhibit we would like to pull up on the screen  
6 and have Chief Crowe talk about some specific things that  
7 have actually happened.

8 THE COURT: Sure.

9 MR. GLOVER: In the police department. And it's  
10 kind of a PowerPoint, where he can talk about where real-life  
11 situations where things have happened that what we, at least,  
12 believe is a lack of clarity in the original Decree --

13 THE COURT: I understand.

14 MR. GLOVER: -- manifested themselves in police  
15 operations.

16 THE COURT: I understand.

17 MR. GLOVER: May I please ask that we pull that  
18 demonstrative up on the screen.

19 THE COURT: You may. And what we're going to do  
20 though is because we need to preserve the record on that, we  
21 are going to make sure that we have marked the demonstrative.  
22 I understand it's a demonstrative. And it's not necessarily  
23 received into evidence, but it needs to be marked for  
24 identification --

25 MR. GLOVER: Right.

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1 THE COURT: -- as 22. And we just need to make  
2 sure that we have that. I'm not sure we do right now.

3 MR. GLOVER: All right. For clarity, we do. We  
4 have distributed it before trial, and it's submitted to the  
5 Court. Defendant's proposed Number 17.

6 THE COURT: Okay.

7 MR. GLOVER: Which would now be the demonstrative  
8 that we would be looking at.

9 THE COURT: We can get 17. So we're going to put  
10 it down as marked at least for ID. Right now it's ID only.  
11 For the people who are not familiar with that, that means  
12 that it's not submitted as evidence, at least at this point  
13 in time. But it is received to show what is being shown,  
14 what is being looked at so that everyone would know what was  
15 being looked at.

16 It's going to be Recent Investigations, I think,  
17 is the title. MPD Recent Investigations June 10, 2020. So  
18 we'll mark it that way.

19 (WHEREUPON, the above-mentioned document was  
20 marked for Identification as Exhibit Number 22.)

21 MR. GLOVER: Thank you, Your Honor.

22 THE COURT: Certainly.

23 BY MR. GLOVER:

24 Q. Deputy Chief Crowe, would you look at this -- and I  
25 know it's hard. Someone else is going to be moving the page

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1 while you're doing the talk. But would you move to the first  
2 substantive section of that presentation and describe to the  
3 Court what this PowerPoint reflects and the incident that  
4 gave rise to the questions that came up about the Consent  
5 Decree in this incident?

6 A. Sure. So most of this PowerPoint was built in 2019.  
7 The PowerPoint was built around times that we were meeting  
8 with the monitoring team, having conference calls with the  
9 monitoring team discussing the Consent Decree. And I would  
10 see these reports of these incidents, and it would dawn on me  
11 that this is related to the discussion we were going. So we  
12 were trying to figure out the best way to present these to  
13 the monitoring team to continue the discussion.

14 The first incident here is a kidnapping that occurred  
15 in Poplar Bluff, Missouri, April 10th, 2019. What you're  
16 seeing here is called an Nlets message, that's N-L-E-T-S,  
17 Nlets message. You can read through there, it shows the date  
18 that it was sent. The time it was sent. And then it was  
19 sent to all law enforcement agencies statewide in the state  
20 of Missouri, the state of Arkansas and the state of  
21 Tennessee.

22 And it reads, "possible kidnapping/abduction of a  
23 female at gunpoint. Poplar Bluff, Missouri." Gives the  
24 victim's name. Gives her description. Mid to late 20s.  
25 Taken against her will by at least two suspects. Suspects

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1 are operating two different vehicles. It has the vehicle  
2 description of a maroon Chevrolet Impala with Tennessee tags  
3 and a silver passenger vehicle with Tennessee license plate.  
4 And it says it's believed that the vehicles are in route to  
5 Memphis area.

6 The only suspect information possible may be a  
7 nickname, and it provides that nickname for the suspect. And  
8 it goes on to say that the suspects are armed and dangerous.  
9 If contact is made to stop and hold all the suspects for the  
10 Poplar Bluff, Missouri Police Department.

11 So when our communications bureau receives these Nlets  
12 messages, they immediately broadcast them on every radio  
13 channel that the Memphis Police Department operates, with the  
14 goal of being every police officer that hears the broadcast  
15 can be on the look out for the suspect.

16 Q. All right. And in fact, was this received and acted  
17 upon by one of our officers?

18 A. Yes, sir. It was.

19 Q. Can you let the Court know how that unfolded?

20 A. Yes. If you'll go to the next slide, please. So what  
21 we had was a uniform patrol lieutenant that was on duty and  
22 heard the kidnapping broadcast dispatched over his radio  
23 frequency. Broadcast included an alias nickname of the  
24 primary suspect and a notation that the victim and suspect  
25 may be headed to Memphis. So the first thing our MPD

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1 lieutenant did -- now, you have to realize he's driving a  
2 marked squad car. He's in the field. This is not a  
3 detective sitting in his office. Laptop and other  
4 technology.

5         So our lieutenant called the Poplar Bluff, Missouri  
6 Police Department to verify the broadcast to see if the  
7 victim had been located. And to see if there was any  
8 additional information and how he could assist the Poplar  
9 Bluff, Missouri Police Department. Through the phone  
10 conversation, our police lieutenant learned that this was an  
11 intimate partner domestic violence kidnapping and that it was  
12 at least two hours old now and that the Poplar Bluff Police  
13 Department had learned the suspect's name from the suspect's  
14 facebook page but the Poplar Bluff, Missouri Police  
15 Department did not know his true, correct name.

16         All right. Next slide. Our Memphis Police  
17 Department lieutenant started checking MPD databases to try  
18 and match the nickname to a true name in order to identify  
19 the suspect and get a possible location the suspect may be  
20 headed to. But the lieutenant was not successful in matching  
21 the nickname to a true and correct name. Then the police  
22 lieutenant used his personal facebook account to view the  
23 suspect's facebook account. And that was based upon the  
24 information provided by the Poplar Bluff, Missouri Police  
25 Department. While viewing the suspect's facebook account,

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1 the MPD lieutenant recognized that one of the suspect's  
2 friend's facebook account was a retired MPD officer.

3 So our lieutenant did what any prudent officer  
4 would do. He called the retired MPD officer. He knew him.  
5 Had his phone number for him. F you'll go to the next slide,  
6 please. Through the phone conversation with the retired MPD  
7 officer, our lieutenant learned that the suspect is his  
8 cousin. Yet retired officer did not know the suspect's true  
9 and correct name. He knew the suspect's mother's name.  
10 Provided that to our MPD lieutenant.

11 Our MPD lieutenant then used other databases the  
12 Memphis Police Department has, and by searching the mother,  
13 he was able to identify the suspect and get the suspect's  
14 true name and his biographical information. And our  
15 lieutenant then compared an arrest booking photo with the  
16 name he believed was correct to the photo on the facebook  
17 account that the Poplar Bluff, Missouri Police Department had  
18 provided. He then compared the two.

19 If you'll go to the next slide. Our MPD  
20 lieutenant then called the Poplar Bluff, Missouri Police  
21 Department, provided them with the true and correct name of  
22 the suspect and all the biographical information the police  
23 department needed for their investigation. This included the  
24 name, address, date of birth, all of that. It included a  
25 phone number.



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1           After a little while, the Poplar Bluff Police  
2 Department called the lieutenant back, and they confirmed  
3 that the MPD lieutenant had provided the true and correct  
4 name. That the person he identified was the suspect  
5 responsible for this kidnapping. Again, confirmed that the  
6 victim had not been located, and she was still in danger.

7           Next slide. Next slide, please. Based upon the  
8 information exchanged between the Memphis Police Department  
9 and the Poplar Bluff, Missouri Police Department, the Poplar  
10 Bluff Police Department was able to alert the Arkansas State  
11 Police. The Arkansas State Police stopped the suspect  
12 vehicle in Trumann, Arkansas. They rescued the victim that  
13 was still in the car. She did confirm that she had been  
14 kidnapped, and they were able to arrest and take the suspect  
15 into custody.

16 Q.       All right. Chief Crowe, in addition to this being  
17 what appears to be good police work by the lieutenant who was  
18 in his squad car, did this raise, at the time, issues about  
19 whether it was clear that proper Kendrick Decree requirements  
20 were followed in both accepting information from the Missouri  
21 agency without making an inquiry as to how they received or  
22 why they were looking at this gentleman's facebook page? We  
23 shared information with a retired police officer to try to  
24 gain additional information.

25           So there was some information sharing with a nonpolice

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1 agency. And then there was sharing of information with the  
2 Arkansas authorities, who were able to make the arrest. Not  
3 to suggest that the intent of the original Consent Decree was  
4 to prevent anything like this, but to just raise concerns  
5 about the need to have some more clarity and definition and  
6 information in the Decree to make clear that this kind of  
7 police work would not be prohibited so that that officer  
8 would not hesitate to act in this prudent way when some  
9 unfolding event is occurring?

10 A. Exactly. That's why we wanted to share it with the  
11 Monitor.

12 Q. And there was no question that this officer did not  
13 seek or obtain a Subsection G authorization from the director  
14 before he accessed facebook to look at the account of this  
15 suspect, right?

16 A. That is correct.

17 Q. But if it was a violation, it was a violation, but he  
18 did not seek director approval, right?

19 A. Right.

20 Q. Okay. And so in your view, has the negotiated set of  
21 provisions and definitions that were incorporated into what  
22 we proposed to the Court clarify how a situation like this  
23 would be handled under the Consent Decree?

24 A. I think it will. Yes, sir.

25 Q. All right. Let's look at the next scenario, if we

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1 could, please.

2 A. This investigation that we're highlighting was on  
3 August the 5th, 2019. The investigation began when an  
4 81-year-old female was the victim of a purse snatching in the  
5 parking lot of a local grocery store here in Memphis. She  
6 was knocked to the ground. She was injured, and she was  
7 transported to the hospital by ambulance.

8 The suspect fled the scene in a car. The car was  
9 occupied by other occupants. The first officers on the scene  
10 were officers from our Uniform Patrol Division. They were  
11 the first ones to make the scene.

12 If you'll go to the next slide, please. Our  
13 patrol officer did a great job in investigating the crime.  
14 He went to the grocery store there and asked to see their  
15 video surveillance from their parking lot. And when he saw  
16 the video surveillance, he thought he might have recognized  
17 one of the female suspects from previous encounters. So that  
18 officer, without any advice or discretion or anything, began  
19 using his personal social media account to try and locate the  
20 female suspect on line. And this is within an hour of the  
21 purse snatch robbery occurring.

22 The officer did discover the female suspect on  
23 line. Based upon the technology of social media, he was able  
24 to develop what part of town the suspect was in. This  
25 officer passed that on to plain-clothes detectives. The

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1 plain-clothes detectives went to the area where the suspect  
2 was thought to be and the task force, and they did spot the  
3 suspect vehicle that was used in the purse snatching at the  
4 grocery store.

5           They were able to stop the suspect vehicle and  
6 take three suspects into custody. One female and two male.  
7 And inside the suspect's vehicle was evidence that connected  
8 them to three additional robberies. So this was a fourth  
9 robbery in their spree. All the robberies had targeted  
10 elderly females in parking lots.

11 Q.       This particular officer used the social media app.  
12 It's not facebook, but it was something more related to a  
13 social media account where folks actually identify where they  
14 are, location information is voluntarily put on this shared  
15 site; is that correct?

16 A.       Correct.

17 Q.       And so when he looked at his personal account because  
18 he participated in that social media platform, he could see  
19 this woman he recognized and actually see in general where  
20 she was, correct?

21 A.       Correct.

22 Q.       Okay. And so no authorization from the director was  
23 requested. No one above this patrol officer instructed him  
24 to do this, but he used the information that he had and his  
25 own personal knowledge and his own personal account to follow

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1 up and ultimately located this suspect; is that correct?

2 A. That is correct.

3 Q. All right. In your opinion, does the language that  
4 the ACLU and the City of Memphis have negotiated attempt to  
5 clarify what would be required of an officer in a situation  
6 like this and incorporate the learnings we have from Judge  
7 McCalla's rulings about legitimate law enforcement purposes  
8 so that it would now be clear to an officer what he or she  
9 should or shouldn't do in this situation?

10 A. Absolutely.

11 Q. All right. Let's go to the next situation.

12 A. The next incident we want to discuss is a series of  
13 conversations or an exchange of a conversation that was  
14 shared with the Memphis Police Department on July 6th, 2019.  
15 It was shared by one of our local shopping malls. Shared by  
16 management at the local shopping mall, where they sent this  
17 to a precinct commander that they had received it from their  
18 mall operations center, which is in a different part of the  
19 country.

20 Their mall operations center monitors threats to all  
21 the malls that they manage. When they perceive a threat to a  
22 mall, they share it with local mall management. Local mall  
23 management here in Memphis shared it with the Memphis Police  
24 Department and expected the Memphis Police Department to act  
25 upon it.

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1 Q. And what did the Memphis Police Department do?

2 A. As you can see, it's a threat to shoot people and kill  
3 people at a shopping mall here in Memphis. And then it set  
4 off a discussion about whether or not we could try and  
5 identify or view any other texts or exchange of information  
6 and identify who the suspects in this case were.

7 Ultimately the mall op center provided us with the  
8 name or a potential name for the person that posted this. We  
9 were not able to find it on our own. And once they provided  
10 us with that name, we did use databases to learn that the  
11 potential suspect was not in the vicinity. He was in another  
12 state.

13 So we contacted the local law enforcement agency in  
14 that state, asked them to go by the suspect's house,  
15 interview him and conduct a threat assessment as to whether  
16 he would be targeting a Memphis shopping mall or a shopping  
17 mall in their local area.

18 Q. Did that result, to your knowledge, in a conclusion by  
19 the officers who responded in that other state that this  
20 person was not a legitimate threat?

21 A. Correct.

22 Q. All right. So this implicates or is a discussion that  
23 came up within the police department was whether this  
24 implicated Subsection I, correct?

25 A. Correct.

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1 Q. Because we are receiving information from, I believe  
2 it was -- was it the Simon mall?

3 A. Yes.

4 Q. Security group and they have their own internal  
5 security staff, correct?

6 A. Correct.

7 Q. And they conduct, we believe, online searches about  
8 threats that may be coming to malls, but we don't know  
9 exactly how or why or what they're thinking about when they  
10 do it, right?

11 A. Yes.

12 Q. And so in this particular case, right or wrong, we  
13 accepted that information. And ultimately someone was able  
14 to defuse the situation and determine that this individual  
15 was not a threat. Not to imply whether the existing Decree  
16 would have allowed this or not, but would the proposals that  
17 have been made by the ACLU and Memphis, as recognizing and  
18 looking at the Judge's rulings about legitimate law  
19 enforcement purpose, would it, in your opinion, clarify how  
20 we behave in a circumstance like this if we had the  
21 clarifying language that we are seeking and have tendered to  
22 the Court?

23 A. Correct.

24 Q. Okay. Let's look at the next situation, that  
25 scenario.

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1 A. As we move from that last one to this one, I'm going  
2 to remind everyone that the date of the last one was  
3 July 6th.

4 Q. Okay.

5 A. Seems that these events are always clustered around  
6 holidays. The next event we want to discuss is  
7 December 26th, 2019, so the day after Christmas. Again, this  
8 was another late evening notification by a local shopping  
9 mall here in Memphis. That their operations center had saw a  
10 Twitter post, and on that account, it says so who shooting  
11 up, names the mall. This year.

12 And immediately, as soon as the mall operation center  
13 reported that to local mall management, local mall management  
14 reported it to the Memphis Police Department and asked us to  
15 investigate it. And always with these things, the first  
16 thing we want to do is get additional uniformed officers to  
17 the mall. We want to have a larger than normal visible  
18 presence there to deter and detect anything that might be  
19 occurring.

20 Then we want to start the investigation into this.  
21 This investigation was requested by a precinct colonel that  
22 we take some -- take action on this. This particular message  
23 that was given to us provided the account name, the person  
24 that posted this on Twitter. So we were able to use that  
25 account name the mall provided us to identify the person that



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1 posted it.

2 Q. Were you able to contact that person?

3 A. Yes, sir. We sent Memphis detectives and a Memphis  
4 crime scene intervention team officer to his house. We  
5 followed what we typically do when we get these types of  
6 threats. We want to interview the person that made the post.  
7 We want to interview his family members. We want to conduct  
8 an investigation.

9 Q. All right. Was this resolved?

10 A. Yes, sir. It was that night.

11 Q. All right. Thank you. Now, did this raise questions  
12 that caused discussion about whether we were entitled to  
13 receive and act upon the Twitter account information that was  
14 sent to us by a non law enforcement security staff?

15 A. Yes, sir.

16 Q. All right. And without regard to whether the existing  
17 Decree would have allowed this or not and whether in the  
18 future it should be allowed or not, in your opinion, does the  
19 language that has been proposed to the Court enlighten us and  
20 incorporate some of the Judge's reasoning, so as to make  
21 clear how we should behave in a situation like this one?

22 A. Absolutely, it does.

23 Q. All right. Do you have one more?

24 A. Yes, sir. One more.

25 Q. Okay.

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1 A. Next slide, please. This is a murder investigation  
2 that took place on February 16th, 2020. I would note that  
3 it's after the Valentine's Day holiday. This occurred on a  
4 Sunday morning at about 2 a.m. in the morning. It started  
5 when officers from our fuelling station were called to a  
6 wounding. Officers located a female. She was in the street.  
7 She was bleeding. She had stab wounds to her arm, to her  
8 head. One report described her hand was almost severed or  
9 amputated from her body.

10 We learned that she had flagged down a passing  
11 motorist, screaming for help. The passing motorist called  
12 911 for her. The officers were interviewing her. She  
13 advised that her husband was the person responsible for  
14 attacking her. And that she had ran out of the house,  
15 leaving her 18-year-old daughter in the house with her  
16 husband.

17 This victim was transported to the Regional One  
18 hospital here in Memphis in critical condition. Officers  
19 responded to the house. They entered the house. They found  
20 the 18-year-old daughter in a bedroom unresponsive. She also  
21 had stab wounds and lacerations to her face, her neck, her  
22 upper torso and her arms. Paramedics were summoned to the  
23 scene, but she was pronounced deceased on the scene.

24 So immediately, we believed the suspect to be on foot  
25 in the area. The officers did a great job investigating it.

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1 They called for the aviation unit, our K-9 officers, the dog  
2 officers to conduct an area search, but the suspect was not  
3 located. The adult female victim that was transported did  
4 provide investigators with her husband's name or at least the  
5 name she knew her husband by. But their attempt to identify  
6 him and get a positive identification on him were  
7 unsuccessful. They could not find him in any local database  
8 that we have. They could not verify his identity.

9 One of the investigators went and used the name that  
10 the wife provided and went to facebook and found that the  
11 suspect did have a facebook page in the name the wife  
12 provided, but again, there was no positive match to any known  
13 person in Memphis. Officers were able to take that facebook  
14 photograph to the victim in the hospital. She was able to  
15 identify her husband as the person that attacked her and  
16 killed her 18-year-old daughter.

17 MPD detectives were able to use that information, put  
18 out a media release and identified the suspect's sister and  
19 made contact with the suspect's sister to try and locate him  
20 to try and get him to turn himself in. And again, this  
21 started on Sunday at 2 a.m. By Sunday afternoon they had a  
22 media release, a warrant issued, and that way, the entire  
23 Memphis community could be on the look out for the murder  
24 suspect.

25 Q. Was he apprehended?

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1 A. Yes, he was.

2 Q. Was he apprehended in what way?

3 A. He was apprehended here in Memphis before he had a  
4 chance to flee the City.

5 Q. All right. And in this case, did the officer who was  
6 seeking a way to get a photograph to be able to get a  
7 positive ID on this suspect, did he or she seek approval from  
8 the Director to look at the facebook page of this individual?

9 A. No.

10 Q. And she -- they shared this information with the wife,  
11 who had been injured, showed that information to her, and  
12 then the media was given a copy of the photograph that came  
13 from a facebook page; is that right?

14 A. That's correct.

15 Q. And ultimately the work that was done resulted in the  
16 successful apprehension of this person, but had there been  
17 concern when this was all evaluated about whether there was  
18 clarity on the appropriateness of the steps taken with regard  
19 to social media in particular and sharing the information  
20 with the media of the photograph under the terms of the  
21 Consent Decree?

22 A. Correct.

23 Q. Is this one of the kinds of items that led the police  
24 department to discuss with the ACLU possible clarifications  
25 of the Decree that would incorporate the Judge's opinions and

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1 statements about legitimate law enforcement activities so  
2 that officers would have clarity on when and how they could  
3 act?

4 A. Yes, sir.

5 MR. GLOVER: You can take that down now.

6 BY MR. GLOVER:

7 Q. Based on your attempts to ensure compliance with the  
8 Kendrick Consent Decree and to assist officers in doing that,  
9 do you have -- have you reached a conclusion as to whether  
10 operation under the existing Decree without modification  
11 would be detrimental to the public interest because of the  
12 lack of clarity we seem to have on some issues?

13 A. Yes, sir.

14 Q. Do you have an opinion as to whether more specificity  
15 around the areas that you've testified to would remove those  
16 ambiguities and allow us to be a better law enforcement  
17 agency?

18 A. It will. Yes, sir.

19 Q. All right. Have you read through the entire proposed  
20 modified Decree and the new section in it and come to any  
21 conclusion about whether those proposed modifications answer  
22 the majority of the lack of clarity questions that have come  
23 up to you in discussions with officers?

24 A. I have read the whole thing, and I think it does, sir.

25 Q. All right. And do you ask the Court to seriously

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1 consider accepting those proposed joint modifications to the  
2 Decree?

3 A. Yes, sir. What worries me is not the officers that  
4 ask questions. It worries me the officers that don't ask  
5 questions. Because I think just ignoring that part of a  
6 potential investigation, I think, for some of the officers  
7 rather than trying to clarify, they just say we'll just  
8 investigate without it and maybe just back away.

9 Q. All right.

10 MR. GLOVER: I have no further questions, Your  
11 Honor.

12 THE COURT: Cross examination, ACLU?

13 MS. YARBROUGH: Yes, Your Honor. I'll be  
14 handling the cross examination of Deputy Director Crowe.

15 THE COURT: Okay. You may want to raise your  
16 camera just a bit.

17 MS. YARBROUGH: I'm trying not to have -- the  
18 camera is located at the bottom of the laptop screen.

19 THE COURT: You're fine. It's up to you. It's  
20 entirely up to you.

21 MS. YARBROUGH: Okay. I have a book that can  
22 help us, I think.

23 THE COURT: That way we can see you a little more  
24 clearly. Thank you. I think we're ready to go.

25 **CROSS EXAMINATION**

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**QUESTIONS BY MS. YARBROUGH:**

Q. So, I wanted to ask you, Deputy Director Crowe, about some of the changes that you discussed with Mr. Glover. He asked about a number of revisions to the Decree that would allow for the Memphis Police Department to use new technologies that may or may not have been contemplated under the original Decree. And you would agree that none of those particular changes, especially regarding the use of social media or new camera technology would allow for the Memphis Police Department to no longer follow the original terms of the Kendrick Decree, correct?

A. (No verbal answer.)

Q. And I'm sorry, I did not hear your answer. I didn't know if that was an issue or with my audio or not; is that correct?

THE COURT: Chief Crowe, can you hear us okay?

MR. GLOVER: That was my fault. I muted the phone. It's my fault. So he heard the question, and he can answer again.

THE COURT: Sure. Go right ahead.

A. My answer would be correct, ma'am. Yes, ma'am.

BY MS. YARBROUGH:

Q. Thank you. So specifically, none of those additions or changes would allow the Memphis Police Department to gather, maintain or store or share information that would be

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1 First Amendment-related information, right?

2 A. Correct.

3 Q. And so for example, none of those changes would allow  
4 the Memphis Police Department to conduct or gather  
5 intelligence as it did with the fake Bob Smith facebook  
6 account, right?

7 A. I'm sorry. Say that again.

8 Q. None of those changes, for example, would allow  
9 Memphis Police Department to gather intelligence in the same  
10 way that it previously did with the fake facebook Bob Smith  
11 account, right?

12 A. That is correct. Yes, ma'am.

13 Q. And it would allow Memphis Police Department -- the  
14 changes would allow Memphis Police Department to use  
15 body-worn cameras, but it wouldn't, for example, allow them  
16 to surveil an individual at a protest merely for protesting,  
17 right?

18 A. Correct. Yes, ma'am.

19 Q. And it wouldn't allow them to store that footage or  
20 catalog it in order to put together a list of who would be  
21 present at that protest?

22 A. That is correct, ma'am.

23 Q. I'd like to ask you about some of the different  
24 scenarios that you posed where officers were able to use  
25 social media to successfully investigate criminal activity.



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1 So for example, in the kidnapping case involving information  
2 from Missouri. At all times, the information that the  
3 officer received from different organizations was related to  
4 solving a crime, right?

5 A. Correct.

6 Q. And the information he received was not First  
7 Amendment-related material?

8 A. Correct.

9 Q. And that he was able to use social media in order to  
10 track down a potential suspect?

11 A. Yes, ma'am.

12 Q. And he was not prevented from doing so by the Decree?

13 A. Correct.

14 Q. And that would be essentially the same with the other  
15 scenarios we provided, that the information being exchanged  
16 was related to criminal activity, right?

17 A. Yes, ma'am. I think some of the concern officers have  
18 is when they open that facebook page, what will be there.  
19 They don't know if the potential suspect's facebook page will  
20 be full of political intelligence-related information, First  
21 Amendment-protected information or if that facebook page will  
22 just be full of criminal information.

23 Q. You agree then that some of the modifications that  
24 you've reviewed would clarify that?

25 A. Yes, ma'am.

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1 Q. Okay. And that social media could be used to  
2 investigate or for purposes of legitimate law enforcement  
3 activity, correct?

4 A. Yes, ma'am.

5 Q. Okay. I'd like to talk to you a little bit about some  
6 of the other concerns related to information sharing between  
7 Memphis Police Department and some of the other agencies that  
8 the police department frequently works with. To your  
9 knowledge, Memphis Police Department hasn't had to dismantle  
10 any of those groups, correct?

11 A. Correct.

12 Q. And that Memphis Police Department officers are still  
13 members of those groups?

14 A. Correct.

15 Q. And that the groups are still functioning, still  
16 making arrests, investigating criminal activity?

17 A. Yes, ma'am.

18 Q. And can you think of any specific instances where  
19 intelligence that was collected by such a group and shared,  
20 you know, amongst Memphis Police Department members had to be  
21 turned away because it didn't comply with the Decree?

22 A. I can't think of a specific instance. But I know the  
23 conversation always occurs, but it usually occurs after the  
24 information is shared, rather than when the information.  
25 Does that make sense?

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1 Q. Sure. To your knowledge when that conversation  
2 occurred, have officers sought authorization through  
3 Section G?

4 A. No, ma'am.

5 Q. So one of those groups that often exchanges  
6 information with the Memphis Police Department would include  
7 CrimeStoppers, right?

8 A. Yes, ma'am.

9 Q. Okay. And CrimeStoppers would be -- it's an anonymous  
10 tip service so that people can call or contact the police  
11 department through an app or a website and submit tips  
12 related to crimes?

13 A. That is correct.

14 Q. And when members of the CrimeStoppers team receive  
15 those tips, they typically vet the tips for accuracy to see  
16 if they're -- well, let me stop there. The members of the  
17 CrimeStoppers team typically vet the tips that they receive,  
18 right?

19 A. I don't think I would call it that they vet the tip,  
20 but they try and match the tip to a specific crime. So  
21 they're not trying to determine if the tip is accurate or  
22 not, but they're trying -- a lot of times the tipster will  
23 know the specific crime. Sometimes they just have a very  
24 generic description. So it has to be matched to the crime so  
25 it can be given to the correct detective, detective bureau.

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1 Q. Okay. So then they would match it up to a known crime  
2 and then send it to the correct department or detective?

3 A. Correct.

4 Q. And that turnaround is typically pretty fast, right,  
5 between receiving the tip and then sending it on?

6 A. Yes, ma'am.

7 Q. Would you say typically within a couple of hours?

8 A. Yes, ma'am.

9 Q. And only the tips that lead to arrests are the ones  
10 that end up being paid out, right?

11 A. Correct.

12 Q. And so you would say that the vast majority of  
13 information that you receive through CrimeStoppers would be  
14 related to criminal activity?

15 A. Yes, ma'am.

16 Q. And that because of the Decree, you have not had to  
17 stop using CrimeStoppers or stopped taking tips from  
18 CrimeStoppers?

19 A. Correct. We have not.

20 MS. YARBROUGH: If I could have just one moment,  
21 Your Honor, I believe those are all my questions.

22 THE COURT: Certainly. Take your time.

23 MS. YARBROUGH: I think we're good. Thank you.

24 THE COURT: All right.

25 Any questions from the Monitor for Chief Deputy

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1 Crowe?

2 MR. PERRY: Yes, Your Honor, not very many.

3 **CROSS EXAMINATION**

4 **QUESTIONS BY MR. PERRY:**

5 Q. Chief Crowe, how are you?

6 A. Very good, sir. How are you?

7 Q. I'm well. It's good to see you again. Ms. Yarbrough  
8 asked you about Exhibit 17.

9 MR. PERRY: Can you pull that, Exhibit 17.

10 That's the recent investigations that Chief Crowe was talking  
11 about.

12 BY MR. PERRY:

13 Q. Chief Crowe, I'm not going to take you all the way  
14 through that again, but I counted five recent investigations  
15 that you mentioned. One was about kidnapping; is that right?

16 A. Yes, sir.

17 Q. One was about robbery; is that right?

18 A. Yes, sir.

19 Q. One was about shootings and killings at a mall; is  
20 that right?

21 A. Two were. Yes, sir.

22 Q. Then there was a second, a mall threat about shooting  
23 up the mall; is that right?

24 A. Correct.

25 Q. And then the final one was a murder, that's correct?

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1 THE COURT: All right.

2 A. Yes, sir.

3 THE COURT: All right. Now, we're looking at  
4 Exhibit 22? So yes, sir. Go right ahead.

5 MR. PERRY: Thank you. Thank you, Your Honor.

6 THE COURT: Certainly.

7 MR. PERRY: Trial Exhibit 22. Thank you, Your  
8 Honor.

9 BY MR. PERRY:

10 Q. So you agreed with Ms. Yarbrough those are all crimes;  
11 is that right?

12 A. Yes, sir.

13 Q. And so you understand that the Consent Decree does not  
14 prohibit the police department from investigating those  
15 incidents and those types of incidents because they're  
16 crimes; is that right?

17 A. It does not prohibit us from investigating them, but  
18 the detectives have concerns about what methods they can use  
19 to investigate them.

20 Q. Okay. And I think I heard you also say to  
21 Ms. Yarbrough that, you know that it's a crime, but if you  
22 get on social media, maybe other information comes up like  
23 maybe you incidentally run into First Amendment-related  
24 information or political intelligence. Maybe you  
25 incidentally run into that, and that's what the police

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1 officers are nervous about; is that right?

2 A. Yes, sir.

3 Q. Okay.

4 MR. PERRY: I want to pull up -- I believe the  
5 original Consent Decree is Exhibit 19, trial Exhibit 19. Can  
6 we pull up the original Consent Decree. I tell you what. We  
7 have it as one of our exhibits if not.

8 THE COURT: It's marked. Right, it's been marked  
9 as 19 in the case.

10 MR. PERRY: I thought it was 19, Your Honor.

11 THE COURT: It is. It is.

12 MR. PERRY: Just pull up Demonstrative E. It's  
13 the same thing. Demonstrative E is the same thing.

14 There we are. Scroll up. See that? Let's go to  
15 Section G there. Just keep scrolling. I'll tell you when to  
16 stop. Thank you.

17 Scroll down a little bit more. The other  
18 direction. All right. Stop right there. Okay.

19 BY MR. PERRY:

20 Q. Chief Crowe, you can see that on the screen, that's  
21 Section G of the original Consent Decree; do you see that?

22 A. Yes, sir.

23 Q. And so I'm just going to read part of G1 there. It  
24 says, "Any police officer conducting or supervising the  
25 lawful investigation of criminal conduct" and we were just

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1 talking about criminal investigations; is that right?

2 A. Yes, sir.

3 Q. "Any police officer conducting or supervising such an  
4 investigation which investigation may result in the  
5 collection of information about the exercise of First  
6 Amendment rights or interfere in any way with the exercise of  
7 First Amendment rights must immediately bring such  
8 investigation to the attention of the Memphis director of  
9 police for review and authorization."

10 Did I read that correctly?

11 A. Yes, sir. You did.

12 Q. So in fact, the original Consent Decree, before any of  
13 the edits that have been offered by the parties laid out a  
14 procedure for police to follow when there was a criminal  
15 investigation that might incidentally implicate First  
16 Amendment rights; is that correct?

17 A. Yes, sir.

18 Q. Okay. I want to ask a couple more questions. This is  
19 a little bit different. You also just spoke a little bit  
20 with Mr. Glover and then again with Ms. Yarbrough about  
21 vetting. Ms. Yarbrough asked you specifically about  
22 CrimeStoppers. And you have some concerns about, you know,  
23 the vetting that the Consent Decree requires you to do; is  
24 that right?

25 A. Yes, sir.



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1 Q. Okay.

2 MR. PERRY: I'd like to pull up -- let's pull up  
3 ECF 250. All right then. That's page ID, it's page 417.  
4 Scroll. Yeah. That's it. Right there.

5 BY MR. PERRY:

6 Q. Chief Crowe, can you see with me that paragraph that  
7 starts "therefore." Reading these two sections of the  
8 monitor's, can you see that paragraph with me?

9 A. Yes, sir. I can. I'm having a little trouble reading  
10 the print, but I do see the paragraph.

11 Q. Okay. There we go. We'll make that a little bit  
12 bigger; is that better?

13 A. Yes, sir. Thank you.

14 Q. I'm going to go to the last sentence in that  
15 paragraph.

16 MR. PERRY: Can we highlight that starts with  
17 Section 1 at the bottom of that Section I right there. Can  
18 you highlight that. There you go. Just that sentence there.

19 BY MR. PERRY:

20 Q. I'm going to read that, and Chief Crowe, tell me if I  
21 read this correctly. "Section I further requires the City to  
22 vet only information that implicates Section G of the Decree,  
23 that is, information gathered as part of a legitimate law  
24 enforcement investigation that incidentally or may  
25 incidentally implicate protected First Amendment activity,"

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1 did I read that correctly, Chief Crowe?

2 A. Yes, sir. You did.

3 Q. So now you've got direction, you have Section G that's  
4 got clear instructions about what happens if you do the  
5 criminal investigation that may incidentally implicate First  
6 Amendment rights. And now you've got direct instruction from  
7 Judge McCalla, this is the only information you need to vet.  
8 You only need to vet information that implicates Section G.  
9 That's all you've got to do. It's right there in black and  
10 white in the Court's order; is that right?

11 A. Yes, sir.

12 MR. PERRY: All right. That's all I've got.

13 THE COURT: Certainly.

14 Is there any redirect, Mr. Glover?

15 MR. GLOVER: There is, Your Honor, very briefly.

16 THE COURT: Sure.

17 MR. GLOVER: If we could pull that exhibit back  
18 up or that court ruling back up.

19 **REDIRECT EXAMINATION**

20 **QUESTIONS BY MR. GLOVER:**

21 Q. While she's doing that, you've already testified,  
22 haven't you, that part of what we're asking is that the  
23 wisdom of the court ruling and explanation in these various  
24 decrees be brought into the language of the Consent Decree  
25 itself; is that right?

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1 A. That is correct.

2 Q. Okay. I'm going to have a question about it here.

3 The part that had been highlighted earlier that says,  
4 Section I further requires the City to vet only information  
5 that implicates Section G of the Decree, that is, information  
6 gathered as part of a legitimate law enforcement  
7 investigation, and then it goes on. Now, is there a  
8 definition in the existing Consent Decree of legitimate law  
9 or -- excuse me -- legitimate law enforcement investigation?

10 A. I don't believe there is.

11 Q. Is that part of what we're seeking with this  
12 modification?

13 A. Correct.

14 Q. All right. And then the statement that Judge McCalla  
15 made that incidentally -- excuse me. I've got a screen  
16 that's got a picture blocking some of this document.

17 MR. GLOVER: Would you make it a little smaller,  
18 so I can see the whole thing here.

19 BY MR. GLOVER:

20 Q. All right. It says, "Section I further requires the  
21 City to vet only information that implicates Section G of the  
22 Decree." Now, Section G in the Decree doesn't even talk  
23 about social media searches that would not be of a criminal  
24 nature, right?

25 A. Correct.

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1 Q. It doesn't let the Director authorize investigations  
2 that are situation awareness or looking at how many folks we  
3 need to put around the St. Jude marathon or questions about  
4 when someone, you know, is going to have a First Amendment  
5 event, how to determine how many officers to have present  
6 because those aren't criminal investigations, right?

7 A. That's correct.

8 Q. And we're not aware of a mechanism in the current  
9 Decree to allow an investigation that might implicate First  
10 Amendment rights that isn't criminal in nature, right?

11 A. Correct.

12 Q. Okay. And when the Judge indicates that something may  
13 incidentally implicate protected First Amendment rights, has  
14 there been some concern, without a little further  
15 clarification, officers are believing that facebook and other  
16 social media, by their very nature, are created to have  
17 people express themselves on them?

18 A. Correct.

19 Q. And that if we don't get some clarification, we  
20 technically may be in a situation that you're going to  
21 incidentally implicate protected First Amendment activities  
22 any time you look at someone's facebook page?

23 A. That's correct, sir.

24 Q. And that in situations where it may be a situation  
25 awareness or public safety issue rather than a criminal

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1 investigation, we would not have a mechanism, at least in the  
2 Decree, to clearly allow access to that information because  
3 the Subsection G only deals with or on its face at least  
4 appears only to deal with criminal investigations?

5 A. That's our understanding. Yes, sir.

6 Q. Okay.

7 A. And this document, I believe, is one of Judge  
8 McCalla's rulings.

9 Q. It is.

10 A. Which the majority of our Memphis officers have not  
11 read or have access to. The rulings are not posted.

12 Q. You have instructed them to read when they've asked  
13 you specific questions?

14 A. Correct.

15 Q. Is it your view that we would be benefitted by that  
16 learning being incorporated into the language of the Decree  
17 that we have to teach?

18 A. Yes, sir. One document that officers can refer to.

19 Q. Thank you.

20 MR. GLOVER: I have no further questions, Your  
21 Honor.

22 THE COURT: All right. Well, we appreciate you  
23 being with us today, Deputy Chief Crowe, and I think that  
24 concludes your testimony. So good to see you again. We're  
25 going to let you be excused.

1           We're going to take a short break at this time  
2 simply for the staff. It's going to be about ten minutes.  
3 And of course, if somebody needs more, they'll let me know.  
4 Then we'll come back for our next witness. I understand our  
5 next witness is -- well, let me make sure who our next  
6 witness is going to be, Mr. Glover.

7           MR. GLOVER: The next witness will be our expert,  
8 Mr. Eric Daigle.

9           THE COURT: Right. That's what I understand. So  
10 about ten minutes and we'll see everybody at that time.  
11 Thank you all very much.

12           (Short break.)

13           THE COURT: All right. We need to check and see  
14 if we have sound, and the answer is we do not. Mr. Castelli?

15           MR. CASTELLI: Yes.

16           THE COURT: We're just testing. We have had a  
17 little issue about how we need to control everything. I  
18 think we're good there. All right.

19           We have our witness there. How are you today?

20           THE WITNESS: Good afternoon, Your Honor.

21           THE COURT: Now I know I can hear you. So now  
22 I'm just waiting on the examiner to show up.

23           MS. SILK: Hi, Your Honor, this is Jennie Silk.  
24 I will be conducting the exam.

25           THE COURT: Oh, you're going to have -- all

1 right. You confused me. I didn't know who was going to  
2 handle that, Ms. Silk. Sorry about that. Then we do have  
3 everyone. Counsel, Ms. Silk, who will our next witness be?

4 MS. SILK: We would like to call our next  
5 witness, Mr. Eric Daigle.

6 THE COURT: All right. Mr. Daigle, if you will  
7 raise your right hand, Mr. Sample is going to administer the  
8 oath.

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**TESTIMONY OF ERIC DAIGLE**

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**ERIC DAIGLE,**

**was called as a witness and having first been duly sworn  
testified as follows:**

THE COURT: Counsel may proceed.

**DIRECT EXAMINATION**

**QUESTIONS BY MS. SILK:**

Q. Hello, Mr. Daigle. Can you please spell your full  
name for the court reporter.

A. Sure. My name is Eric Daigle. E-R-I-C, Eric. And  
Daigle, D-A-I-G-L-E.

Q. Great. Thank you. And what is your occupation?

A. I'm an attorney.

Q. And I'm going to go ahead and admit the report that  
you created for this case and is docketed as Document  
Number 3 of 6 as an exhibit. Do you have a copy of that?

THE COURT: Right. Reports are normally not  
received if there's opposition by counsel opposite, but if  
there's no opposition, they can be. And the reason is, of  
course, that they are reports only, and they are not received  
typically as evidence. I don't have any problem with that,  
but I do need to, on that circumstance, need to hear from  
Mr. Castelli if there's an objection. If there's no  
objection, we'll simply receive it.

MR. CASTELLI: Not in this type of proceeding,



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1 Your Honor. I think that the Court will give the report the  
2 weight it wants to give it, and I don't have a problem with  
3 it being admitted, so we know what we're talking about if the  
4 report comes up in conversation with the witness.

5 THE COURT: That's perfectly fine. And I assume  
6 there's no objection from the Monitor.

7 MR. STANTON: (No verbal response.)

8 THE COURT: You're still on mute. I can see that  
9 you're indicating there's no objection. And Mr. Sample, if  
10 you have to unmute on your equipment because of the way that  
11 we need to make sure everybody -- okay. Can you unmute  
12 yours? We're really just testing. Yours is not unmuted.

13 MR. STANTON: Okay. Yeah. I think we were  
14 locked at one point, Your Honor. Based on Mr. Castelli's --  
15 no objection from the monitoring team, based on the reasons  
16 outlined by Mr. Castelli.

17 THE COURT: No problem. And of course, I simply  
18 usually go over the rule, the basic rule so that everybody  
19 knows were making an exception to the rule. That's perfectly  
20 fine. All right.

21 Counsel, that's marked and received as 23. And  
22 counsel may proceed.

23 (WHEREUPON, the above-mentioned document was  
24 marked as Exhibit Number 23.)

25 MS. SILK: Thank you, Your Honor.

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1 BY MS. SILK:

2 Q. If you could please scroll to the page of your report  
3 where your CV begins, I think that would just be helpful for  
4 everyone. And I believe that's page 37. Okay. Mr. Daigle,  
5 you said that you are an attorney. And where did you obtain  
6 your degree?

7 A. I obtained my juris doctorate degree from Quinnipiac  
8 University in Hamden, Connecticut.

9 Q. And where did you go to undergrad?

10 A. Central Connecticut State University in New Britain,  
11 Connecticut.

12 Q. Are you here to testify today regarding the changes in  
13 factual conditions related to police practices, police use of  
14 technology, social media and interagency collaboration?

15 A. Yes.

16 Q. How long have you been licensed as an attorney?

17 A. Approximately 19 years.

18 Q. In which state or states?

19 A. Just the state of Connecticut.

20 Q. Okay. And you're currently a practicing attorney?

21 A. Yes.

22 Q. Could you please describe for the Court the nature of  
23 your law practice, which I believe it says here is Daigle Law  
24 Group, LLC?

25 A. Yes. Daigle Law Group is a unique firm in its

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1 application, it's not just legal, as you would know it. But  
2 also as a consulting application, we provide guidance and  
3 operational oversight for police departments, corrections and  
4 security across the country as it directly relates to  
5 practice and application of policy, training and management  
6 application on a daily basis.

7 Q. And how long have you -- I'm assuming that you are  
8 the -- you said you're the managing member of Daigle Law  
9 Group. How long have you ran Daigle Law Group?

10 A. Daigle Law Group was formed in May of 2010.

11 Q. Okay. And what did you do before Daigle Law Group?

12 A. Before Daigle Law Group, I was a litigation attorney  
13 with the firm of Halloran & Sage in Hartford, Connecticut,  
14 where my focus was municipal operations for the New England  
15 regions, specifically in law enforcement application.

16 Q. Okay. And prior to that?

17 A. Prior to that I spent ten years with the Connecticut  
18 State Police. Spent my career mostly in the investigative  
19 entity. While I actually always say I over-achieved myself  
20 out of a good job and got my degree, both undergrad and legal  
21 degree, juris doctorate while I was employed with the  
22 Connecticut State Police.

23 Q. Wonderful. And prior to the Connecticut State Police,  
24 did you serve in the military?

25 A. I did, yes. I started my military career as a

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1 reservist, but I was activated for -- I was sent to active  
2 duty for Operation Desert Shield and Operation Desert Storm  
3 as a military police officer.

4 Q. So were you deployed?

5 A. Yes.

6 Q. Thank you so much for your service.

7 A. Thank you.

8 Q. Now let's talk a little bit more about some of the  
9 specialized training that you have received that has informed  
10 your expertise in police practices and use of technology.  
11 What kind of special training have you had?

12 A. Over the career obviously, during like many of the  
13 witnesses that testified, during your law enforcement career,  
14 you continually have updated training. I spent most of my  
15 career in investigations, specifically what we call major  
16 crime, which us a homicide unit. So most of my investigation  
17 training in that time was related to crime scene interview  
18 interrogation. The aspects relating to conducting those  
19 forms of investigation. Cold case and, lack of a better  
20 term, serial killer type investigations.

21 Once I entered into the legal realm, I began to obtain  
22 additional training in areas of significance at that time,  
23 which were mainly use of force and use of force related. And  
24 so I have certificates in continuous external training  
25 related to use of force investigation, such as a Force

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1 Science certificate. I have achieved the advanced specialist  
2 moniker for Force Science video investigation.

3 I'm also a certified civilian oversight with an  
4 organization called NACOLE. A certified litigation  
5 specialist with an organization called Americans for  
6 Effective Law Enforcement. And during that time, I've also  
7 maintained law enforcement certifications. So that requires  
8 here in the state of Connecticut to have continued update,  
9 what we call inservice training or update training, so that  
10 you can be recertified every three years, which I've  
11 maintained, you know, since my -- since I left the state  
12 police in 2020 -- 2002, sorry.

13 Q. Great. Are you a member of any particular  
14 professional associations or organizations that are related  
15 to law enforcement and policy and practice?

16 A. Yes. I'm not only a member, but I'm also acting  
17 certain positions with a lot of the key law enforcement  
18 organizations across the country. You're looking at the CV,  
19 so I'll just go in order. So the FBI Law Enforcement  
20 Executive Development Association, which is one of the three  
21 nonprofit branches of the FBI academy. I've been their  
22 general counsel and an instructor for that organization since  
23 January of 2007. I've been a member of the International  
24 Association of Chiefs of Police for approximately 16 years.  
25 Having served on their legal officer section, I also have

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1 made my way through as the chairman of the legal officer  
2 section. During my -- over my tenure with the IACP, I'm  
3 proud to have been selected multiple times to remain as a  
4 member of the civil rights committee for the IACP. And I'm  
5 often selected to assist in policy development and/or issue  
6 development.

7 For example, one of the things that will be relevant  
8 to these proceedings is approximately eight years ago when  
9 the recording police and the litigation cases started to  
10 arise on recording police and the First Amendment issues  
11 associated with the right of citizens to record police I was  
12 placed on a committee to develop the policy in roll call  
13 training to instruct officers across the country on the legal  
14 obligation of citizens to be able to record them.

15 I maintain multiple involving committees related to  
16 the development of what we call model policies. IACP has  
17 actually moved away from model policies to now what we call  
18 concept papers, so that there is just more operational  
19 information provided to the police chiefs instead of just,  
20 you know, a cold policy. A little bit of explanation. Kind  
21 of like a white paper to explain the thought process.

22 I've been involved in National Tactical Officers  
23 Association for many years. I'm currently the legal section  
24 chair for the National Tactical Officers Association. The  
25 Connecticut Chiefs of Police Association, I'm on the board of

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1 directors. And I've been a member of the Police Foundation.

2 Americans for Effective Law Enforcement. Since  
3 January 2009, I've been on the board of directors for that  
4 legal application. What's important with Americans for  
5 Effective Law Enforcement is it's a research-based  
6 organization that looks to gather information and knowledge  
7 to submit to law enforcement executives and officers across  
8 the country dealing with all sorts of related issues and  
9 constitutional-based issues. There is an extensive library  
10 that's maintained by the Americans for Effective Law  
11 Enforcement that we govern as the board of directors,  
12 including a amicus brief team that evaluates cases going to  
13 the Supreme Court for interpretation of their effect on  
14 constitutional operations for law enforcement and best  
15 practices.

16 Q. Okay. Great. Now, when you -- just for the court  
17 reporter, you used an acronym, IACP. What does that stand  
18 for?

19 A. Yeah. Sorry about that. International Association of  
20 the Chiefs of Police.

21 Q. Okay. Great. And you stated that you were the  
22 chairman of the IACP at one point; is that correct?

23 A. I was the chairman of the legal officer section. So  
24 within IACP, there are sections that are directly related to  
25 expertise, for lack of a better term, so there is a

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1 psychological section, a physician section, a legal section.  
2 And the purpose of those sections is for the expertise of  
3 those sections to assist in supporting law enforcement  
4 executives in the development of practice and policies as it  
5 relates to the specialty of that section.

6 Q. When were you the chairman of that division of the  
7 IACP?

8 A. 2014 through 2016.

9 Q. And was that -- what was the emerging issue in law  
10 enforcement during that time?

11 A. Oh, I think you're talking about the Ferguson, the  
12 death of Michael Brown and the resulting president's task  
13 force for 21st century policing. As being the chairman of  
14 the legal officer section, you also have a unique opportunity  
15 as a quasi counsel for the president of the IACP, which, you  
16 know, is solely representing the interest of all police  
17 executives in the country.

18 And so I had the ability to be involved in the outcome  
19 and the process that was followed by the president's task  
20 force to evaluate police operations in this country, starting  
21 in December of 2014 through its report in March of 2015.

22 Q. Great. I'd like to ask you, have you ever published  
23 any articles or blogs?

24 A. Yes. Hundreds unfortunately. We -- as a firm, we  
25 produce a Tuesday morning article every week that goes out to



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1 the country on current legal issues. Whether it's Fourth  
2 Amendment, First Amendment, whatever the -- whatever we find  
3 to be a relevant issue, either just ruled upon by a Court of  
4 Appeals or the Supreme Court. And also issues directed at  
5 current trends that officers or police executives need to be  
6 aware of or just sometimes just a reminder, so...

7 Q. Do you do any teaching or lecturing in the field of  
8 police practices related to technology, First Amendment,  
9 social media, those type of things?

10 A. Yeah. So I do extensive training in law enforcement.  
11 I have for the past 15 years. I average probably about 80 to  
12 a hundred days a year doing some form of training. You know,  
13 as the issues arise across the country, training changes as  
14 to the needs of our law enforcement executives. So I would  
15 say that First Amendment really started to become a training  
16 platform about six to eight years ago when we started dealing  
17 with the First Amendment interpretations of recording police  
18 and the issues of challenges with wiretapping statutes and  
19 those type of challenges. Also after Occupy in 2012, crowd  
20 control and First Amendment protections became a hot topic.

21 So it was at that time where we started to do training  
22 programs, general training programs for law enforcement  
23 officers, but more importantly, I kind of travel the circuit  
24 for police executives. Every state has a chiefs of police  
25 association. You've heard a lot of the witnesses talk about

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1 their time in the FBI National Academy, and the NA has  
2 retrainers. And then there's the IACP conference and other  
3 types of national training programs for law enforcement  
4 executives, where we have focused pretty much for the last  
5 four or five years on First Amendment-related issues,  
6 specifically the issues that have topics of discussion.

7 So crowd control, crowd management, First Amendment  
8 protections of citizens, recording police, social media,  
9 First Amendment rights and the manner in which how to conduct  
10 investigations, both criminal and administrative  
11 investigations, dealing with these First Amendment issues as  
12 the juris prudence or First Amendment law starts to get  
13 worked out in a more detailed, specific arena across the  
14 country.

15 Q. Great. Thank you. Now, have you ever served on any  
16 monitoring teams that monitor any law enforcement agencies in  
17 the United States?

18 A. Yes, ma'am. I have. I served on the monitoring team  
19 for Oakland Police Department for a period of six years.

20 Q. And what was the nature of your involvement there?

21 A. As you've heard other witnesses testify, you usually  
22 have an experienced scope of your assignment. I was assigned  
23 stop data. And also internal affairs and use of force  
24 functions, based on the agreement that the Oakland Police  
25 Department had with the plaintiff's counsels in that matter.

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1 Q. Okay. And have you ever consulted as an expert on any  
2 other case?

3 A. I have spent a majority of my time working as a  
4 consulting expert for agencies that are under consent  
5 decrees. So as you know, in a consent decree, what everybody  
6 here is familiar with, there could be multiple sides of a  
7 consent decree. So in the ones that were very prominent,  
8 2012 through even now, I had a side where DOJ, Department of  
9 Justice, might be one of the parties and where the judge or  
10 the monitoring team worked for the judges or party, and then  
11 you had the entity itself.

12 I've worked for Virgin Islands, Puerto Rico, Niagara  
13 Falls, New York as the consultant for the department to try  
14 to manage their policies, procedures, operations, training,  
15 to get them to comply with the requirements of the agreement  
16 that they were under and trying to get them, assist them in  
17 -- to meeting the agreement requirements.

18 Q. Great. And have you also worked in an expert capacity  
19 on any other litigation other than this case?

20 A. Yes. To this date I started doing expert cases about  
21 2012. I have about 30. Actually, I think there's 30 in the  
22 documents that are here. But we're probably up to about --  
23 things are coming in pretty quickly nowadays. So 30-plus  
24 cases.

25 Most of those range and are involved in three

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1 different areas. So you have plaintiff cases, and you have  
2 criminal cases, where officers have been arrested or charged  
3 by a district attorney. And then you have defendant's cases.  
4 And most of those areas at this point involve use of force,  
5 deadly force, officer-involved shootings, tactical  
6 operations.

7 I do have a series of cases out of Louisiana on crowd  
8 control, First Amendment issues. And recently some cases out  
9 of St. Louis involving crowd control or crowd management  
10 application by the police department.

11 Q. Okay. Great. Thank you. Now I want to refer back to  
12 the first part of this document, which is your actual report  
13 that you created. What documents did you review in  
14 preparation for your -- in preparing this report and for your  
15 testimony today?

16 A. Yes, ma'am. So the information that I reviewed is  
17 what was listed on page 3 of that document.

18 Q. Okay.

19 A. Do you want me to go through the order of that?

20 Q. No, that's not necessary. I just wanted to direct it  
21 to everyone's attention. And after you completed this report  
22 and in preparation for your testimony, did you arrive at a  
23 conclusion regarding whether the Consent Decree should be  
24 modified to account for the changed factual circumstances  
25 since 1978 relating to technology, the First Amendment and

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1 the way people communicate today?

2 A. Yes, I did.

3 MS. SILK: Your Honor, at this time I tender this  
4 witness as an expert in the field of law enforcement use of  
5 technology, social media and law enforcement best practices  
6 related to First Amendment activity.

7 THE COURT: Any voir dire? Any voir dire by the  
8 ACLU?

9 MR. CASTELLI: I just want to make sure I'm  
10 clear. My understanding is that the subject matter that the  
11 expert's going to testify is about the technology use and  
12 information by law enforcement. He's not here to provide a  
13 legal opinion on whether the, you know, what the legal  
14 standard for modification is or anything of that. I just  
15 want to make sure we're not going to have the same issue that  
16 we had earlier with Mr. Henegan's testimony.

17 THE COURT: Sure. Absolutely. I think your  
18 question has been heard by our witness. Perhaps he can  
19 respond.

20 THE WITNESS: Yes, Your Honor. My expertise is  
21 the practice aspect, which is taking the relevant standards  
22 and applying them to policies for guidance and supervision,  
23 management of the issues that are being addressed. And then  
24 also the process of training both officers and command staff  
25 of what is considered to be the practices that they should

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1 meet in order to ensure lack of violation of the  
2 constitutional rights.

3 THE COURT: Okay. Any other questions,  
4 Mr. Castelli? I believe it's not one where he's going to  
5 render or attempt to render an opinion as to any specific  
6 legal issue that confronts the Court but rather we'll focus  
7 on the practice and the practices of departments and, of  
8 course, the evolution of these types of policing practices in  
9 digital age. Do you want to ask a question or two?

10 MR. CASTELLI: Given that that's the scope of the  
11 witness's testimony, I don't think I need to ask any further  
12 questions other than the ones that counsel for the City have  
13 already asked.

14 THE COURT: Sure.

15 MR. CASTELLI: Regarding his qualifications.

16 THE COURT: Mr. Perry, are there any questions  
17 from the Monitor?

18 MR. PERRY: No, Your Honor. We think this is a  
19 matter that's kind of uniquely to soon to be addressed by the  
20 parties. We don't have a position on Mr. Daigle's fitness to  
21 be an expert.

22 THE COURT: I understand. The witness is  
23 accepted as an expert in the areas outlined in his report.  
24 And so counsel may proceed.

25 MS. SILK: Thank you, Your Honor.

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1 BY MS. SILK:

2 Q. Mr. Daigle, when you were engaged as an expert by the  
3 City, at that time was the City seeking to also vacate or set  
4 aside the Consent Decree as well or in the alternative modify  
5 the Consent Decree?

6 A. That was my understanding, yes.

7 Q. So when you wrote your expert disclosure, did you  
8 write it in support of the City's efforts to vacate the  
9 Decree at that time?

10 A. Vacate, yes.

11 Q. And now that the ACLU of Tennessee and the City have  
12 agreed to a number of proposed modifications to the Consent  
13 Decree, you're aware that the City no longer seeks to vacate  
14 the Decree?

15 A. I am aware of that, yes.

16 Q. Okay. And so are there any -- is there any part of  
17 your report that is now mooted by the City's withdrawal of  
18 its motion to vacate?

19 A. I don't believe so.

20 Q. Okay. Now, I referred to the proposed modified  
21 Consent Decree, and that is trial Exhibit 21. Do you have a  
22 copy of that, Mr. Daigle?

23 A. Yes, ma'am.

24 Q. Okay. It's the redlined version, and we're going to  
25 share that on our screen here so everyone can see it. Have

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1 you reviewed this document?

2 A. I have, yes.

3 Q. Some of the proposed addition to the Consent Decree by  
4 the parties that we've heard testimony on several times is  
5 found in the definition Section B. And it's B3. It's the  
6 definition of legitimate law enforcement purpose. And we've  
7 read it several times here. I just would like for you to  
8 please talk about what type of activities are conducted for  
9 legitimate law enforcement purposes?

10 A. I believe the -- my initial review of this definition  
11 seemed to fit the need as it clears -- the purpose -- I  
12 thought it could probably use a little bit of clarity on also  
13 conducting criminal investigations. Other than I do agree  
14 that with the party's position that a legitimate law  
15 enforcement purpose would be to further the prevention of  
16 crime and to ensure the safety of the public and law  
17 enforcement personnel.

18 I thought the only addition I would have added would  
19 be also for criminal investigation. I know it's covered in  
20 other areas of the agreement. Just to be -- again, it's  
21 important, as many witnesses have said, that we're trying to  
22 ensure a standard that can be met by officers on patrol. And  
23 so the more clarity that we can get would provide more  
24 clarity in the form of a policy and training to the officers.

25 Q. Okay. And so you'll agree -- do you agree with the



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1 statement that there are types of law enforcement activities,  
2 legitimate law enforcement activities that are unrelated to  
3 the prevention of crime?

4 A. That are -- I'm sorry. One more time. I apologize.

5 Q. Sure. Let me rephrase. You heard testimony yesterday  
6 that this definition should be modified to be limited to the  
7 furthering of -- furthering the prevention of crime. And my  
8 question to you is, are there any other law enforcement  
9 activities that are unrelated to the prevention of crimes  
10 that are legitimate law enforcement activity?

11 A. Oh, yes. Absolutely, yes. You know, specifically  
12 that's where I think the provision of ensuring the safety of  
13 the public and law enforcement come into play, like you've  
14 heard from multiple witnesses. The aspect of information  
15 threat assessment analysis, you know, things that occur that  
16 there's a duty and obligation to just evaluate for the  
17 purposes of ensuring the safety of citizens and law  
18 enforcement personnel.

19 Q. Thank you. Now, you mentioned earlier that the IACP  
20 has moved away from what you called model practices and moved  
21 towards a standard. I can't remember what you called it.  
22 Was it white papers or?

23 A. Yeah.

24 Q. Concept papers?

25 A. Yeah. They now call it the issues and concept papers.

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1 Q. And who has access to those type of concept papers?

2 A. Well, I believe that there are -- so there is a  
3 website on the International Chiefs of Police called the  
4 model policy or policy center application. There are some  
5 that are actually open to the public. And especially ones  
6 that are of great concern to the public. And then every  
7 police executive or anyone who has a membership withheld to  
8 IACP can have access to those papers.

9 Q. And so can you explain for the Court and for the  
10 parties how a law enforcement agency would draw on that body  
11 of knowledge and for what purpose?

12 A. Well, the best way would be for what we've talked  
13 about, and that is policy development. In determining best  
14 practices in the industry. You know, when you develop --  
15 part of my firm is a policy development section where we  
16 write policy manuals across the country and have actually  
17 written the model manual for the State of Tennessee with the  
18 Tennessee chiefs of police association. The key is that you  
19 have to -- those policies have to be based on what we would  
20 call best practices, and those best practices come from  
21 multiple areas. And papers such as these written by  
22 organizations such as the IACP will draw upon those best  
23 practices, which would include multiple different areas so  
24 that police executives will have some basis in order to put  
25 together their policies and procedures.

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1 Q. Thank you. Now, I'd like to shift the conversation to  
2 talk specifically about social media and law enforcement's  
3 use of social media.

4 A. Okay.

5 Q. Mr. Daigle, can you tell us how the nature of policing  
6 has changed since entry of the Consent Decree in 1978, as it  
7 relates to social media.

8 A. Well, I think when you heard the other witnesses  
9 testify and those of us that have been involved in law  
10 enforcement, you know, 30 years, it didn't exist back then.  
11 And we've watched technology enter society, and at the same  
12 time we've watched that technology become a part of our  
13 everyday interaction. Those of us that have been around for  
14 a while, you know, remember the times where we did take  
15 information down with a paper and pencil, but the challenge  
16 as it came through was that the increase of technology has  
17 been so significant. And social media became the way in  
18 which society would interact with each other.

19 And when I talk to law enforcement officers,  
20 investigators today, the mechanisms that they're using to  
21 investigate threats and crimes are just totally different  
22 than what we did 25 years ago. The old days of interviewing  
23 witnesses and knocking on doors and hours and hours of  
24 surveillance, well, that has been morphed into a new world of  
25 social interaction where communication and interaction and

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1 posting of opinions and documents and photos and videos are  
2 now at a touch of a fingertip on a cell phone. And that has  
3 completely changed the way.

4 Interesting when preparing for this, you know, these  
5 types of discussions always make us think about different  
6 areas. And I kind of -- I just wanted to see what the social  
7 media statistics was. So if you look at Amazon's statistics,  
8 and there's a website, and I'll give you the link because you  
9 can obviously vet it for whether it's important. Multiple  
10 websites report on social media. And this was  
11 [www.brandwatch.com](http://www.brandwatch.com), which was an Amazon social media  
12 statistics. You know, 7.8 million (sic) people in the  
13 worldwide population. There are 3.725 billion active social  
14 media users. The websites, the stats show that every person  
15 has about 7.6 social media accounts. I would interpret that  
16 to be different social media accounts.

17 And the interesting part for me, having three children  
18 was that the daily amount of time spent by citizens in this  
19 country on social media was about 142 minutes a day. I think  
20 that's very significant. The one thing that we can  
21 definitely guarantee that that has continued to increase over  
22 the years. It was not in existence in 1978. But I was seven  
23 years old, so I'm just going to go with that it wasn't in  
24 existence when I became a police officer in 1992. And it  
25 wasn't -- it was just beginning to get into existence when I

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1 left the state police in 2002. And we've seen such a  
2 dramatic increase with all aspects of law enforcement, both  
3 operationally and administratively as it comes to social  
4 media and its implications.

5 Q. Thank you. Now, did you hear the testimony of the  
6 monitoring team's police practices expert yesterday,  
7 Dr. Theron Bowman?

8 A. I heard some of his testimony, yes. Not all of it  
9 though.

10 Q. Okay. And with respect to his assertion that social  
11 media -- and I'm paraphrasing here -- but social media does  
12 not contain a treasure-trove of information, resources and  
13 tips with regard to criminal investigations. Do you agree  
14 with that assertion?

15 A. I do not agree with Dr. Bowman's assertion. In fact,  
16 I think he took that out of my report because I actually use  
17 that phrase in paragraph 26 of my report. Because I do  
18 believe and I think that any reasonable interaction with law  
19 enforcement or security industry in a whole would tell you  
20 that social media is a treasure-trove of information. And I  
21 kind of joke on the aspect of when I interact with major  
22 crime investigators that are doing the job now that I did  
23 20 years ago and we ask them, you know, what did you do? Did  
24 you go out interview people? Did you go out and collect  
25 evidence, fingerprints, DNA, what did you do? Tell me about

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1 the stuff that we like to hear about, the work, the hard  
2 police work done. And when they come back and say well, we  
3 found a video of it on social media. That's it. That's what  
4 you did.

5 And so those are the challenges where the things are  
6 different nowadays because, as I put in my report, social  
7 media has a lot of, a lot of treasure-trove applications,  
8 meaning photos, relationships, accomplices, content,  
9 information sharing. Most people that are sharing on social  
10 media are doing so without concern of who's looking at it or  
11 why they're looking at it.

12 There's hundreds and hundreds of cases where  
13 individuals have been arrested, and we're just -- we're even  
14 seeing that as of today, with all the reports on crowd issues  
15 and protests across the country. And different things that  
16 are reported that are coming. It's all information coming  
17 off of social media.

18 Q. Great. And yesterday Mr. Bowman referenced a  
19 handbook, the NATO Open Source Intelligence Handbook of 2001.

20 MS. SILK: And we e-mailed a copy of what we  
21 believe to be that document to the Court last night. And I  
22 would ask if we could show it, publish it, please. And then  
23 I would like to move it into evidence.

24 THE COURT: Okay. The NATO Open Source  
25 Intelligence Book. We have that. It's obviously hearsay.

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1 And there are several ways that hearsay documents like this  
2 can be used. But the first question is, is there any  
3 objection because often these types of materials are  
4 referenced but not received. I'm not saying it wouldn't be  
5 appropriate to receive it. I simply want to know how ACLU  
6 views the receipt of this document. It can be used in  
7 several ways.

8 MR. CASTELLI: Yeah, Your Honor, I don't think we  
9 would object to it be marked for ID purposes. I believe it  
10 was referenced yesterday in testimony.

11 THE COURT: Sure.

12 MR. CASTELLI: And so if it's helpful to  
13 reference it today in rebuttal testimony, that's fine with  
14 us. I don't know that it needs to be admitted as evidence  
15 because as the Court just noted, it's not really evidentiary.  
16 It's more of a -- and I don't think that the City is  
17 intending to move this in as evidence. But that would be our  
18 objection.

19 THE COURT: Sure. We'll certainly mark it. I'll  
20 check with -- also with the Monitor, but it will certainly be  
21 marked for identification. I think that's important. So  
22 without objection, we'll mark it as 24 for identification.  
23 It's possible that it might be capable of being received, but  
24 I think as it's being presented, it's being presented as a  
25 secondary source in the matter; is that correct from the

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1 City?

2 MS. SILK: Yes, Your Honor. And that's perfectly  
3 acceptable with us. We just wanted to just show the -- a  
4 couple pages from the document --

5 THE COURT: Sure.

6 MS. SILK: -- on page 5.

7 THE COURT: Certainly fine. And of course --  
8 yes, ma'am. Go right ahead.

9 MS. SILK: Okay.

10 (WHEREUPON, the above-mentioned document was  
11 marked for Identification as Exhibit Number 24.)

12 BY MS. SILK:

13 Q. So Mr. Daigle, have you had a chance to look at this  
14 document?

15 A. I reviewed it. I cannot say I studied all 57 pages of  
16 them, but I did review it when you sent it to me, yes.

17 Q. Fair enough. And then, on the cover page, it says  
18 it's dated November 2001; is that correct?

19 A. I did see that, yes.

20 Q. Okay. And then on page 5, there's a section on the  
21 Internet that begins on page 5. And I just wanted to see if  
22 you can read the last sentence of the first paragraph.

23 A. Yes, I can read it.

24 Q. We're going to highlight it.

25 THE COURT: That's interesting. Probably not the



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1 proper use of a secondary source. And I think my witness  
2 knows that. So we're going to see if that can be rephrased.

3 MS. SILK: Okay. No worries, Your Honor. Just  
4 one question.

5 BY MS. SILK:

6 Q. Do you find this book to be current or outdated?

7 A. Well, I would say outdated just because it's dated  
8 2001. And there is much more information relevant to the  
9 Internet and all of its workings, as we sit here in 2020.

10 Q. And is this NATO handbook relevant at all today to  
11 policing and technology?

12 A. I would hope not.

13 Q. One last question on this, I'll move on. Did facebook  
14 exist in 2001?

15 A. Great question. I don't think so. Because I don't  
16 think I had one at that time. That's about all I can -- for  
17 the purpose.

18 Q. Okay. Fair enough. Okay. I would like to go back to  
19 our trial Exhibit, 21 which is the redlined proposed modified  
20 order judgment and Decree.

21 A. Yes, ma'am.

22 Q. And in terms of social media and its inclusion in this  
23 new version of -- this proposed new version of the Decree, I  
24 want to see if we can talk about specific sections of this  
25 proposed modified Decree. Specifically, I want to talk about

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1 Section D2. Do you have that in front of you?

2 A. I do, yes.

3 Q. Okay. And it says, "The Memphis Police Department may  
4 view information posted to social media for legitimate law  
5 enforcement purposes, so long as it does not improperly  
6 catalog and disseminate that information pursuant to  
7 Section H. This viewing of information posted to social  
8 media includes conducting threat assessments."

9 We've read this several times today, so I'm not going  
10 to continue to read it aloud, but in your opinion, is it  
11 important for modern-day law enforcement to be able to view  
12 social media for legitimate law enforcement purposes, so long  
13 as it does not improperly catalog and disseminate that  
14 information?

15 A. Yes. I think that the parties have done a good job of  
16 identifying, you know, the structure of how that should  
17 occur. And so I would agree with that statement, yes.

18 Q. Okay. And is it fair to say that new technology like  
19 social media is a changed factual condition that did not  
20 exist since 1978?

21 A. It is fair to say that, yes.

22 Q. If the Consent Decree remains unmodified and is  
23 interpreted literally, without allowance for social media use  
24 by law enforcement for legitimate law enforcement purposes,  
25 in your opinion, could that affect the public interest

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1 detrimentally?

2 A. It could. And it probably will, especially since the  
3 rate of technology enhancement and usage in law enforcement  
4 and by society is increasing at such a high level. We're all  
5 having difficulty maintaining an actual clear practice to  
6 guide officers on how to use certain areas.

7 So while that's difficult in and of itself waiting for  
8 courts to interpret different areas of the First and the  
9 Fourth Amendment and also looking at new technology that's  
10 coming out, and you all know that, you know, there is a new  
11 social media app every day that allows a broader evaluation  
12 and a broader -- an expansive ability to share all sorts of  
13 information.

14 We're looking at a lot of different technology across  
15 the country and especially in the AI technology, where  
16 individuals are, you know, with both Amazon and all of the  
17 Siri, all the types of technology increases are putting  
18 challenges on both sides. And so it is very important in  
19 this area that at least the agreement comes up to the current  
20 standards because we know that those standards will continue  
21 to develop as technology and law develops around it.

22 Q. Great. Thank you. Now, in the same vein as we're  
23 talking about social media, I'd like to look at Section G of  
24 this document, which is investigations which may interfere  
25 with the exercise of the First Amendment right. In the very

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1 first proposed paragraph there in blue, it's the first  
2 sentence says, "Investigations and intelligence gathering,  
3 which are reasonably unlikely to result in the collection of  
4 information about the exercise of First Amendment rights or  
5 interfere in any way with the exercise of such First  
6 Amendment rights are permissible and require no special  
7 authorization under Section G."

8 Do you see that?

9 A. Yes.

10 Q. What is the importance of the inclusion of  
11 intelligence gathering in this document, the allowance for  
12 intelligence gathering?

13 A. The allowance for intelligence gathering is always  
14 important, especially, as the witnesses have testified to,  
15 there is threat assessment in multiple areas, and it's  
16 just -- it's not threat assessment as much for law  
17 enforcement nowadays, it's threat assessment for society.  
18 And to make sure that the proper resources are available to  
19 address the issues for the protection of those that are  
20 peacefully and legally using their First Amendment right.

21 And one of the things that is difficult and most of  
22 the witnesses that testified over the past two days, you  
23 know, the chief having talked about Charlottesville, and when  
24 you don't have the proper resources available, then you're  
25 always behind in the reaction. And that could put you at a

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1 disadvantage, which also can put the safety of the citizens  
2 of Memphis, who are just there to express their First  
3 Amendment desires, could put them in harm's way. And that's  
4 really what we're trying to do here is ensure that  
5 individuals who want to express their First Amendment right  
6 can do so with all the required protections of the law.

7 Q. Great. And further down in Section G, specifically  
8 paragraph 8 of Section G. Do you see that paragraph?

9 A. I do, yes.

10 Q. Okay. Are there certain crimes that occur primarily  
11 or exclusively on the Internet?

12 A. Yes. The more the Internet expands, and I think Chief  
13 Crowe talked a little bit about that. And I believe maybe  
14 even some of the witnesses yesterday talked about that. I  
15 mean, the more that the Internet is the basis of how  
16 interaction occurs and how opinions are portrayed, how  
17 threats are delivered and also having to do -- I think the  
18 one, the most significant law enforcement spending his time  
19 on, as Chief Crowe said, is obviously that doing -- having to  
20 do with child pornography and the issues having to do with  
21 interstate movement of children and different areas as it  
22 applies to identity theft. Those are significant areas where  
23 the Internet becomes the catalyst for that crime.

24 Q. Great. Thank you. Now, while in Section G, I want to  
25 go backwards and talk about the proposed modification whereby

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1 the Director would be allowed to have a designee to authorize  
2 these types of investigations. Are you familiar with that,  
3 beginning on paragraph 5?

4 A. Yes, ma'am.

5 Q. In your opinion, is it important for the director of a  
6 police department the size of Memphis Police Department to  
7 have a designee or various designees to do a number of things  
8 but specifically authorize these investigations?

9 A. I think it's very important.

10 Q. Why so?

11 A. You know, especially using a department the size of  
12 Memphis with all that's going on, you know, that designee is  
13 important. And I think as the Director testified himself,  
14 you know, he's unavailable, or I'm sure he has many, many  
15 things going on during the day. I think it would actually be  
16 more beneficial for the protection of First Amendment rights  
17 if there were specific designees assigned because there would  
18 be more time and energy that could be spent by that designee,  
19 and the Director would have some confidence in the  
20 individuals that they would put in charge of that.

21 But they would be able to spend a little bit more time  
22 probably working with all parties and the monitoring team as  
23 they work their way through these analysis to actually start  
24 to develop some consistency. I assume in most departments, a  
25 chief of police, a director, a colonel having that direct

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1 contact from the investigator in the field to the top of the  
2 org chart is a very, very difficult standard. And I'm sure  
3 he takes it very seriously. And I think he would be -- not  
4 to speak for him because he spoke for himself. But I think  
5 having a designee who is going to spend specific time dealing  
6 with these issues would allow for some consistency and  
7 continuous -- more importantly, I think it would allow for  
8 continuous evaluation of the issues that are being faced by  
9 the department, so that they can continue to develop and work  
10 with the parties to address the issues that are coming up.

11 Because what is occurring today will change. It  
12 always does. And when one thing changes, we're always having  
13 to catch up and adjust, and it is always a time lag between a  
14 new type of expression, a new type of application to a policy  
15 and training on that. And usually what happens is that the  
16 lag is so long that we get in harm's way, either legally or  
17 criminally, and we could have dealt with that if we were able  
18 to put more resources on it along the way.

19 Q. Thank you. Mr. Daigle, how has the nature of  
20 undercover police work changed since 1978?

21 A. Well, I think you just -- as I said when I started, it  
22 has dramatically changed. And from the outside looking in  
23 because obviously I'm not working in that, but it is my  
24 responsibility across the country to advise police executives  
25 and write policies and procedures that govern how these

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1 investigators are doing their job to ensure that we are  
2 putting some sound principles in place that will maintain the  
3 protection of peoples' constitutional rights.

4           You know, the old days of hiding in the bushes and  
5 surveillance teams and listening devices and recording  
6 machines and all of those undercover operations have  
7 developed into the fact that if social media is -- or let's  
8 just call it what it is, social networking is a form of  
9 networking that is now done via multimedia application, then  
10 in the olden, you know, 20, 30 years ago, networking was done  
11 in person. It was done in cafes. It was done in bars. It  
12 was done in a different application.

13           Now it's done on technology. It's done on social  
14 media. It's done on apps, on undercover apps. It's done on  
15 blogging and websites. And so because the manner in which  
16 the action occurs means that law enforcement has to react to  
17 the manner in which they investigate it. And so as the way  
18 the crimes occur changes, so does the mechanisms on how the  
19 crimes are investigated.

20 Q.       Great. Thank you. And have you reviewed Section E of  
21 this document?

22 A.       Yes, ma'am.

23 Q.       Okay. And in your opinion, are the additions that the  
24 parties have proposed in Section E related to undercover  
25 accounts, are those in line with other police departments



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1 across the country?

2 A. Yes. And I think actually here that the parties have  
3 an opportunity to actually set some standards. And I know  
4 that's something that all the parties are interested in, even  
5 the Judge. And that is as we develop practices for  
6 undercover accounts and social media, it also is important to  
7 cover -- to develop policies and best practices to govern  
8 that.

9 And so I think what the parties have done here is to  
10 basically take the way that we used to do, you know,  
11 undercover confidential informants is the same way that's  
12 been proposed to do an undercover account on social media.  
13 And the important part of that is to have some guidelines and  
14 also some accounting for how it occurs and some mechanisms to  
15 ensure that the organization has got some control over who,  
16 what and when it is using a social media account for an  
17 undercover application.

18 Q. And in this document, Subsection B, is it your opinion  
19 that in B, the City and the ACLU have agreed that those  
20 protections need to be implemented regarding undercover  
21 social media accounts?

22 A. Yes. You did agree and I would agree with you because  
23 it is important that in all operational standards that there  
24 is a checks and balance system to ensure that there is -- and  
25 more importantly that the desires of the Director, the

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1 desires of the parties but more importantly, that the  
2 operations of the department are meeting the constitutional  
3 standards that are available.

4 Q. Great. And I would like to now talk about -- kind of  
5 shift and talk about law enforcement's use of physical  
6 technology as opposed to social media and Internet,  
7 specifically the use of cameras. How has law enforcement's  
8 use of cameras changed since entry of this Consent Decree?

9 A. Well, they've become, you know, very prolific and  
10 specifically after 2014, when the shooting death of Michael  
11 Brown when the ACLU requested that, you know, the articles  
12 that were put out there was -- it's the future of police  
13 transparency that every officer will have a camera. And I  
14 think that that's continued on.

15 And I will tell you that back then, I was in favor and  
16 I am still in favor of the use of body-worn cameras for the  
17 purposes of all the things that the Director talked about  
18 this morning and the fact that they offer both protections to  
19 citizens and the protections to the department. And I think  
20 there are just a -- they're a tool. They're not the truth.  
21 They're a part of the investigation. They definitely have  
22 limitations. But I think that both sides, that both the  
23 citizens and the police department -- police officers feel a  
24 level of comfort knowing that some form of recording is  
25 occurring during the interaction that can be used later for

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1 evaluation purposes.

2 Q. In your opinion, without the proposed modification  
3 related to body-worn cameras, could that detrimentally affect  
4 the public?

5 A. Yes. And I would say this is one of the areas where  
6 the history is clear that it's not 1978 anymore because  
7 obviously, the equipment and the mechanisms that we use are  
8 significant, and they're only getting more significant on a  
9 day-to-day basis. And I think it would really be a benefit  
10 to society to understand more.

11 I encourage my police executives across the country to  
12 really sit down with their communities and tell them about  
13 the body-worn cameras and what they do. And how that is such  
14 a beneficial tool that can be used for both the benefit of  
15 society and the department.

16 Q. Great. Now, is there any kind of inherent problem  
17 with having a policy, like a body-worn camera policy and  
18 having an exception to that policy for, say, First  
19 Amendment-related activity?

20 A. Well, the problem with any exception, and I'll take  
21 the question at the first level, if you'll let me, and that  
22 is the problem with any exception is that just like we're all  
23 used to, there's a rule and then there's an exception. And  
24 then there's an exception. And the difficulty is, remember,  
25 we were trying to make it so that the men and women on the

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1 street understand what they're supposed to do and when  
2 they're supposed to do it. I truly believe that the majority  
3 of them will do whatever we tell them to do, but we have to  
4 be able to provide them the guidance necessary where they  
5 understand it.

6 And so when you start to get into a rule that the rule  
7 that we have in a national standard for body-worn cameras is  
8 if you have it and you're interacting with society, you want  
9 to turn it on. Well, once you start getting exceptions to  
10 turning it on, now you're increasing discretion. And you're  
11 increasing the need for evaluation and analysis and decision  
12 making and all of those things. You have a long history of  
13 becoming detrimental. And basically the best way to describe  
14 it is as much detrimental as inconsistent. And when things  
15 are inconsistent, they're all over the place. And we can't  
16 rely on the fact that good evidence or good documentation of  
17 an incident is guaranteed to occur.

18 Q. Great. Thank you. And on the topic of cameras, what  
19 has changed about law enforcement's use of stationary cameras  
20 and pole cameras since 1978, specifically the proliferation  
21 of cameras?

22 A. We live in a society now where there is a camera  
23 everywhere. Whether it's a Ring Doorbell or a camera owned  
24 by a government entity or a camera owned by a business. We  
25 live in a world where anyone who walks around not believing

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1 they're being recorded is probably not paying attention.

2           So we have to sit back and ask ourselves why is there  
3 so much recording and increase in technology to recording.  
4 And I think, you know, the answer that I would come back with  
5 is because everybody feels that their recording is somehow  
6 protecting their rights, whether it's their right to own  
7 property or their right to have a business or their right to  
8 walk freely or their right to protest.

9           And so you know, here comes law enforcement, and I  
10 think what I found very encouraging in the City of Memphis is  
11 how much interaction and collaboration there was between the  
12 Government and society, business, neighborhood organizations.  
13 I found that to be amazing, almost as if it was a college  
14 campus. And I think that shows that there is a benefit, that  
15 everybody believes there's a benefit in recording and having  
16 video recording because it makes things easier to discuss  
17 later. To identify challenges, to identify good, bad and  
18 indifferent. And I think as we continue on, I don't know how  
19 much more we can put out there in the world of technology and  
20 cameras, but I guarantee you it's going to continue in  
21 addition versus subtraction.

22 Q.       Great. And does the parties' proposed modification to  
23 Section H3 related to cameras and H4, for that matter,  
24 cameras and body-worn cameras. In your opinion, are these  
25 modifications adequate and sufficient and consistent with the

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1 best practices, while allowing for the protection of the  
2 First Amendment rights of the citizens of Memphis?

3 A. I believe they are. I believe that, you know, we  
4 really started to see the -- the first issue with protests in  
5 law enforcement with cameras really was Oakland Police  
6 Department in 2012 with the Occupy. And at that point they  
7 were one of the first organizations to have under -- they  
8 were under a Consent Decree at the time. Still are.

9 But they were one of the first entities in the country  
10 to do a full deployment of cameras. And after the Occupy of  
11 2012, that led to significant litigation, use-of-force  
12 issues. There was thousands of hours of video based on  
13 body-worn cameras worn by officers.

14 And if you read any of the studies that came out after  
15 Ferguson protests, after Occupy and then Baltimore, the  
16 significance of the body-worn camera and the significance of  
17 the recordings and even media's recording of these incidents  
18 is just to ensure that everything goes the way it's supposed  
19 to go. And so we live in an age where, you know, years ago  
20 we had to tell officers, you know, that it's a constitutional  
21 right for you to be recorded by citizens. And we made  
22 policies called the recording police policies about that  
23 right. And it's also the same right of the officers to have  
24 recordings.

25 So it's really getting to a concept of you record me,

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1 I record you, but the benefit is across the board for  
2 operations and effectiveness. And then as you talked about,  
3 there's also the need for documentation of evidence and  
4 threat assessment that is becoming more significant, as some  
5 of these protests have become a little more violent across  
6 the years.

7 Q. Thank you. I want to turn your attention to Section H  
8 of the proposed modified Consent Decree. That's the section  
9 on maintenance and dissemination of information. Do you have  
10 it in front of you?

11 A. Yes, ma'am.

12 Q. In your experience, has the way that law enforcement  
13 agencies and municipalities -- has the way that they store  
14 and manage information about citizens, about cases, about  
15 incidents, has that changed since 1978?

16 A. Sure. I mean, all of the witnesses from both the  
17 monitoring team and the City have talked about the data  
18 systems and the extensive dispatch systems and record systems  
19 that we now have. You know, when we were -- when I started  
20 teaching, you know, First Amendment crowd control issues, you  
21 know, two decades ago, we would talk about keeping files on  
22 different groups and different individuals and how that was  
23 not allowed. And so this is really the same concept, but  
24 it's just got to address the way in which documents are now  
25 stored and information is now stored on a technology system

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1 owned by a department.

2 Q. Thank you. Did you have the opportunity to review the  
3 request for authority that the City submitted to the Monitor  
4 on October 4th, 2019, when the then city attorney received a  
5 tip from a personal friend, where he overheard two people  
6 discussing their purported plans to disrupt a Memphis  
7 Grizzlies basketball game?

8 A. I did, yes.

9 Q. Okay. And do you recall, did the Monitor permit the  
10 City to act on that information and share it with the  
11 Grizzlies?

12 A. My recollection is he did not.

13 Q. Is that best practice for a legal officer of the City  
14 to not share that type of information with a private entity?

15 A. You mean legal officer -- do you mean by --

16 MR. PERRY: Your Honor, this is Will Perry for  
17 the Monitor. I'm going to object. This has been made plain  
18 several times now. That's a tip, that's and RFA that was  
19 decided before the Court's opinion in November of 2019. I  
20 don't think the question or the answer are relevant.

21 THE COURT: It's no longer relevant. Objection  
22 sustained. We do need to talk about our schedule. And I'm  
23 going to check first with my witness or our witness,  
24 definitely. We usually have been stopping on a regular time,  
25 which is 5 o'clock here, 6 o'clock where you are because this



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1 is a public hearing, and we have to maintain regular hours.  
2 We don't usually run extremely late. It looks to me like  
3 that the cross examination would leave us little hope of  
4 finishing very quickly.

5 What is your availability at all early tomorrow  
6 or at any time tomorrow? And I understand that was an issue,  
7 but I thought I'd simply ask.

8 THE WITNESS: Yes, Your Honor. I appreciate it.  
9 I'm currently on a project in Oregon with a flight leaving  
10 out of Oregon early tomorrow morning to go back to the east  
11 coast, which is a great long travel day. So that is the  
12 issue that I'm faced with, sir.

13 THE COURT: Okay. And so I'll understand a  
14 little more clearly. Where are you right now?

15 THE WITNESS: I am currently in Corvallis,  
16 Oregon.

17 THE COURT: Okay. Corvallis, Oregon. And when  
18 You will arrive back in --

19 THE WITNESS: I have a flight out.

20 THE COURT: Go ahead, tell me. I'm sorry.

21 THE WITNESS: Sorry, Judge. I have a flight out  
22 of here tomorrow morning at 8 a.m. to San Francisco. And San  
23 Francisco to Boston, Massachusetts. That is a long travel  
24 day, but that's unfortunately my travel day tomorrow.

25 THE COURT: No, I understand. Let me ask counsel

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1 for the City. I think you probably have another 20 to 30  
2 minutes, is that what you think? Or maybe it's much, much  
3 less.

4 MS. SILK: Your Honor, I would estimate 15  
5 minutes at the most.

6 THE COURT: All right.

7 And I'm going to ask Mr. Castelli. I assume you  
8 have questions?

9 MR. CASTELLI: I do, Your Honor. I would imagine  
10 probably about 15 to 20 minutes of cross examination. Not  
11 terribly long, but still.

12 THE COURT: Let me check with the staff. That's  
13 actually the most important thing. What's our situation for  
14 our reporter?

15 THE COURT REPORTER: I am okay to stay, Your  
16 Honor. Thank you.

17 THE COURT: The reason we ask, in New York, of  
18 course, I know that when we're there, they have certain  
19 strict rules about court reporting, which are certainly fine.  
20 But our court reporter has been kind enough to say she will  
21 stay another 30 minutes. We will need to conclude in that  
22 time period.

23 And so I'm going to ask the City to limit your  
24 inquiries to not more than ten minutes. And I will have to  
25 call time on you. So I think your witness can meet that

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1 deadline, can you?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: You may want to try to do that. I've  
4 been asked for a three-minute break though because the staff  
5 needs a short break. So we're going to take a three-minute  
6 break. We'll come back in three minutes. Thank you all very  
7 much.

8 (Short break.)

9 (Court resumed via telephone conference.)

10 THE COURT: This is Judge McCalla. Let's just  
11 check and see who we have so far. Who do we have?

12 MR. STANTON: Your Honor, this is Ed Stanton and  
13 Will Perry, and I just texted the number to Mr. McMullen and  
14 Mr. Castelli, so they should be dialling in.

15 THE COURT: Okay. That's fine. As soon as we  
16 get them, we will actually adjourn for the day, and we will  
17 schedule a time for the witness to complete probably on  
18 Monday.

19 MR. STANTON: Yes, sir.

20 THE COURT: We're going to go back on mute for a  
21 minute and wait for people to beep in. Thank you.

22 MR. STANTON: Yes, sir.

23 THE COURT: That's fine.

24 MS. SILK: Hello, this is Jennie Silk for the  
25 City.

1 THE COURT: All right. Ms. Silk, we've got one  
2 more to check in, and we've got the Monitor's team on, so  
3 we'll be ready to go in just a minute.

4 MS. SILK: Great, thank you.

5 MR. CASTELLI: It's Thomas Castelli.

6 THE COURT: All right. Mr. Castelli, I think  
7 you're almost the last one on the board today. We've got  
8 Ms. Silk. We have you for the City; is that right?

9 MS. SILK: That's correct, Your Honor.

10 THE COURT: All right. And we have the Monitor.  
11 And we have Mr. Stanton, right?

12 MR. STANTON: That's correct, Your Honor.

13 THE COURT: We're learning about our technology,  
14 and I think we should have stopped at 5:00. What we're going  
15 to do is we'll have -- we have a backup plan, and we  
16 shouldn't have this problem again. But what we needed to do  
17 really anyway was to go ahead and recognize that we should  
18 conclude for the day.

19 And we'll simply let -- Ms. Silk, we'll let you  
20 work out a time for our witness to complete his examination.  
21 If that's possible, on Monday, that would be good. Of  
22 course, I don't think it will be practical for tomorrow. But  
23 will you just let us know what's going to work out well for  
24 our witness and for you?

25 MS. SILK: Yes, Your Honor.

1           THE COURT: There's a technology issue that we'll  
2 just have to overcome. The systems work really quite well  
3 considering it's our first time out with it. Now, anything  
4 else then? You will get a new invitation tomorrow. You  
5 should be able to get that by 8:30.

6           THE CASE MANAGER: They'll have it before I leave  
7 today.

8           THE COURT: Well, you'll have it, exactly.  
9 You'll have it before we leave today, but I mean, you should  
10 be looking for it. We will test everybody at a quarter till,  
11 except me probably, and make sure that everything is working  
12 fine. And then we have a new step to make sure that this  
13 doesn't happen again. It's called Nathan. He's right here.

14           And what we'll do is we'll double host it, and  
15 that should eliminate any issue. So we're learning something  
16 every day. I think y'all have been great on this. The court  
17 reporter tells me that our sound has been exceptionally good.  
18 So we should all feel good about that. So really I'm more  
19 than willing to hear from everybody. I'm not sure what else  
20 we can do. Always interested to hear from the Monitor  
21 because he always has good ideas.

22           Anything else, Mr. Stanton, from you?

23           MR. STANTON: Nothing further, Your Honor. We do  
24 appreciate the patience and the accommodation from you and  
25 your team. I think, under the circumstances, things have

1 gone extraordinarily well from the technology. The only  
2 other question I would have for the monitoring team, Your  
3 Honor, is just schedule for tomorrow. Understanding that  
4 Mr. Daigle will pick back up sometime on Monday that we work  
5 out. I know Director Rallings. If the City could draw a  
6 road map of what we can expect tomorrow.

7 THE COURT: Absolutely. And we'll go back to  
8 Ms. Silk, and maybe she can enlighten us. Hopefully  
9 Mr. McMullen has also come in on the line by now. Ms. Silk,  
10 can you enlighten as to the rest of the schedule for  
11 tomorrow? I think we have a preliminary view of that, but  
12 can you give us the rest of it?

13 MS. SILK: Yes, Your Honor. The lineup from the  
14 City has not changed. We intend to put Director Rallings on  
15 first to conclude his examination and cross examination. And  
16 then, as you mentioned, Mr. Daigle unfortunately is not going  
17 to be available tomorrow, so we'll pick him up on Monday.  
18 After Director Rallings, we'll hear from Major Darren Goods  
19 and Zayid Saleem, and we will possibly hear from the City's  
20 chief legal officer, Jennifer Sink.

21 THE COURT: All right. Well, that's -- I'm sure  
22 we're going to conclude before the end of the day. I think  
23 we'll probably make good time tomorrow, and then we'll work  
24 out the rest of the schedule. And if there's anybody else,  
25 Mr. Castelli, from you, you will let me know. Is there

1 anybody else you anticipate at this time?

2 MR. CASTELLI: No, Your Honor. I believe Chief  
3 Crowe was able to answer the questions that we thought we  
4 might need another witness to talk about. So we will not be  
5 calling Lieutenant Collard as we thought we might need to.  
6 So I think once the City finishes with their witnesses, we'll  
7 have all the proof we think we need, and we should be able --  
8 other than Mr. Daigle, obviously, we'll need to finish his  
9 examination.

10 THE COURT: That sounds fine.

11 MR. CASTELLI: But that should be it tomorrow.

12 THE COURT: I am going to check back with the  
13 Monitor. Do you anticipate anybody who would come on to  
14 answer any further questions? It would be sort of in the  
15 context of rebuttal although it's not exactly. But do you  
16 think that anybody else will need to then be recalled to  
17 clarify anything?

18 MR. STANTON: I don't think that -- there's a  
19 slight possibility, Your Honor, Dr. Bowman very briefly, just  
20 depending on the remainder of Mr. Daigle's testimony, but if  
21 there's anyone at this point, it may be a very brief  
22 testimony from Dr. Bowman.

23 THE COURT: All right. Well, that's a good  
24 schedule. We look forward to checking in with everybody at  
25 least at a quarter till. Of course, Mr. Sample will be in

1 charge of the check-in. Then we will resume promptly at  
2 nine o'clock. And we promise you that Nathan will be here  
3 all day. All right. Thank you all very much.

4 (Adjournment.)  
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**C E R T I F I C A T E**

I, CANDACE S. COVEY, do hereby certify that the foregoing 257 pages are, to the best of my knowledge, skill and abilities, a true and accurate transcript from my stenotype notes of the Zoom Modification Hearing on the 18th day of June, 2020, in the matter of:

ACLU OF TENNESSEE, INC.

vs.

CITY OF MEMPHIS

Dated this 25th day of June, 2020.

S/Candace S. Covey

CANDACE S. COVEY, LCR, RDR, CRR  
Official Court Reporter  
United States District Court  
Western District of Tennessee